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IN THE

Supreme Court of the United States

October Term, 1975

No. **75-1810**

FLORENCE BEHAR,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Florence Behar, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 4, 1976, which affirmed a judgment of conviction previously entered against her in the United States District Court for the Eastern District of New York (Appendix "A" hereto, *infra*, p. 1a).[1]

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[1] The appendices annexed to this petition are paginated "1a", *et seq.*

Prior to the trial herein, several of the defendants, including petitioner, petitioned the Court of Appeals for a writ of mandamus directed to the trial judge, *Bernstein et al.* v. *Travia*, Docket No. 73-1591. A four volume appendix was filed

[Footnote continued on following page]

Opinions Below

The Court of Appeals affirmed in a yet unreported opinion, *United States* v. *Bernstein, et al.*, —F.2d— (March 4, 1976). The majority opinion is reproduced in Appendix "A", hereto, *infra*, at pp. 1a-47a. Circuit Judge Van Graafeiland vigorously dissented, arguing for a complete reversal of petitioner's conviction. His dissenting opinion is reproduced in Appendix "A", at pp. 47a-65a. Thereafter, Judge Van Graafeiland amended his opinion with respect to a matter not relevant to this petition (Appendix "B", hereto, *infra*, pp. 66a-67a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was filed on March 4, 1976 (1a), and the Court of Appeals denied both rehearing and rehearing *in banc* on May 14, 1976 (Appendices "B" and "C" hereto, *infra*, at pp. 66a-69a). This petition is filed within thirty days of the denial by the Court of Appeals of the timely petition for rehearing.

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in connection with that petition. Volumes I and II were paginated "A. 1", *et seq.*; Volumes III and IV were paginated "B. 1", *et seq.* By order of the Court of Appeals, those four volumes constituted part of the appellants' appendix with respect to the appeals from the various judgments of conviction.

Volumes V and VI were added to the appendix so as to complete the documents necessary for the appeal, and they are paginated "C. 1", *et seq.* A complete set of Volumes I through VI, inclusive, will be certified to this Court in connection with the instant petition.

References herein to the trial transcript, which exceeded 25,000 pages, are preceded by "Tr.".

Questions Presented for Review

This petition presents several questions of Constitutional dimension. Certain of these questions have produced a conflict of opinion, both within the Second Circuit (*See*: dissenting opinion of Judge Van Graafeiland, Appendix "A" hereto, *infra*, at pp. 47a-65a), and with a recent opinion of the United States Court of Appeals for the Sixth Circuit, *United States* v. *Ekelman & Associates*, —F.2d— (March 12, 1976). Moreover, each of the questions presented appears to conflict with established precedents of this Court, and if the resolutions espoused by the majority opinion prevail, they are likely to have a profound effect upon criminal liability and upon the administration of justice throughout the United States.

1. In an unprecedented decision, the Court of Appeals ratified the District Court's pre-trial order which ousted petitioner's retained counsel of choice from the case, upon the alleged ground of conflict of interest, despite petitioner's pleas that her attorney be permitted to represent her. Was petitioner deprived of the effective assistance of retained counsel of her choice, in violation of the Sixth Amendment, when the District Court ordered the attorney of her choice to terminate his representation, and was the District Court in error when:

   A. It found that an actual conflict of interest existed?

   B. It refused to accept petitioner's unequivocal waiver of the alleged conflict of interest?

   C. It deprived petitioner of the right to waive the alleged conflict of interest upon the ground that petitioner's effort to exercise the right was "not knowing and intelligent"? As-

suming, *arguendo*, that the factual predicate for the Court's opinion was correct, did not the Court have the obligation to sufficiently impress the significance of such a waiver upon petitioner so that petitioner could make a "knowing and intelligent" choice for herself, rather than have it imposed upon her by the Court?

D. It failed to take steps within its power, including assignment of previously retained counsel or a grant of a severance to petitioner, rather than ousting petitioner's retained counsel of choice?

2. Was petitioner deprived of the effective assistance of assigned counsel, who replaced petitioner's retained counsel of choice, since:

A. At the time of the assignment, both the District Court and the prosecution, but not the petitioner, knew that the assigned attorney was then representing a Federal Housing Administration employee who worked out of the very Federal Housing Administration office with which petitioner was alleged to have had unlawful dealings?

B. The District Court permitted the assigned attorney to absent himself from critical pre-trial and trial proceedings, and permitted attorneys representing co-defendants at trial to "pinch hit" for the assigned attorney, and *vice versa?*

3. Was the indictment herein fatally defective since:

A. The false statement counts (18 U.S.C. § 1010) of the indictment failed to charge

that petitioner had knowledge of the falsity of written statements of mortgage applicants which petitioner forwarded to the Federal Housing Administration? and

B. The false statement counts of the indictment failed to particularize or even indicate which of the numerous statements in bulky FHA application packages were alleged to be false?

4. As argued by Judge Van Graafeiland in his dissenting opinion, was the District Court's charge to the jury erroneous with respect to the standard of liability as to the false statement counts of the indictment, since the Court's charge:

A. Permitted the jury to conclude that petitioner had an "affirmative duty" to exercise "proper credit judgment" with respect to statements made by mortgage applicants to the FHA and "to insure that such statements were true"?

B. Permitted the jury to reach this conclusion based upon Federal Housing Administration instruction manuals, and similar materials, rather than upon the provisions of any statute or legislatively authorized regulation?

C. Failed to define the concept of "proper credit judgment"?

D. Failed to properly charge the jury that if petitioner actually believed the statements were true, she must be acquitted?

5. Was there a fatal variance between the indictment and the proof, since the trial evidence established the existence of multiple conspiracies, and did the trial court err when it refused to

charge the jury on the issue of multiple conspiracies?*

6. Was the sheer length of this nine month trial the result of an abuse of prosecutorial and judicial discretion which deprived petitioner of a fair trial?

7. In view of the above noted errors, must petitioner's conviction be reversed in all respects?

Constitutional Provisions and Statutes Involved

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

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* In view of the length of this petition and the importance of the other questions presented, petitioner here sets forth questions 5, 6 and 7, although they are not discussed under the reasons for granting the writ. In the event that the writ of certiorari is granted, petitioner respectfully requests leave of the Court to thereafter argue those questions.

nesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

18 United States Code § 1010:

§ 1010. Department of Housing and Urban Development and Federal Housing Administration transactions

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

As amended May 25, 1967, Pub.L. 90-19, § 24(c), 81 Stat. 28.

Statement of the Case

A. Preliminary Statement.

On March 28, 1972, an indictment was filed in the Eastern District of New York naming twenty-four defendants and containing one hundred fifty counts (B. 11-76), which charged violations of the Bribery (18 U.S.C. § 201), False Statement (18 U.S.C. § 1010), and Conspiracy (18 U.S.C. § 371) statutes, all of which concerned

applications to the Federal Housing Administration for home mortgage insurance.

On March 22, 1972, a superseding indictment was filed which, in substance, duplicated the original indictment.

Following a year of repeated motions by the defendants, predicated upon the sheer length of the prospective trial upon prejudicial misjoinder of counts and defendants, the District Court, on the eve of trial, directed the prosecution to shorten the indictment by limiting the number of counts. As a result, the case went to trial upon a redacted indictment which contained sixty-five counts, all of which were sequentially renumbered (C. 118-142). Nonetheless, the trial lasted nine months.

The redacted indictment [hereinafter, "The Indictment"] charged that, from March 30, 1967 to March 29, 1972, the defendants had entered into a single conspiracy with regard to applications for mortgage insurance which were submitted to the Federal Housing Administration [hereinafter, "FHA"] through Eastern Service Corporation [hereinafter, "Eastern"]. The indictment alleged that false statements had been submitted to the FHA and that officials of the FHA had been bribed for the purpose of increasing "the value of real property" and for the purpose of procuring, within the FHA, improper processing, review and approval of applications.

The indictment named as defendants:

Eastern Service Corporation, a mortgage brokerage firm located in Hempstead, New York, and classified as an "Approved Lender" by the FHA;

Certain officers and employees of Eastern, including petitioner;

Employees of the Hempstead, New York, office of the FHA;

Dun & Bradstreet, Inc., a credit reporting agency utilized by Eastern for the purpose of securing credit reports as to prospective mortgagors;

An employee of Dun & Bradstreet;

Ortrud Kapraki, a real estate broker who submitted mortgage insurance applications to the FHA through Eastern; and

Certain employees of Ortrud Kapraki.

Several defendants pled guilty, and others were severed on the eve of trial, leaving nine defendants to stand trial.

Th trial proceedings commenced on October 1, 1973 (Tr. 1), and the jury returned its verdict, with respect to petitioner, on June 25, 1974, almost nine months later (Tr. 21930). Five defendants, including petitioner, were convicted.[2]

B. The Federal Housing Administration.

The FHA is an agency of the United States government which issues policies of mortgage insurance for the purpose of encouraging lenders to finance mortgages in situations where borrowers might otherwise not be able

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[2] Each of the convicted defendants appealed to the Court of Appeals, and that Court affirmed the convictions of each of them in the same opinion, which is reproduced in Appendix "A", hereto, *infra*, p. 1a *et seq.* We are advised that Eastern Service Corp., Harry Bernstein, and Rose Bernstein are filing a joint petition for a writ of certiorari with this Court, and that Melvin Cardona is individually filing such a petition. Therefore, including the instant petition, there will be three petitions filed. It is respectfully requested that petitioner be given the benefit of the questions and arguments presented in the related petitions.

to secure such mortgages due to relatively poor credit standing or due to the nature of the neighborhoods in which they wish to purchase homes. As an FHA expert testified at trial, a person could be on welfare, he might only have $200.00 to put down on a home, he might have a poor risk rating in many recognized categories, and he may be seeking to purchase a home in a ravaged area, and yet he might qualify for FHA insurance (Tr. 2687).

The FHA maintains offices throughout the Country for the processing of mortgage insurance applications. One such office is located in Hempstead, New York, in the same building as a number of FHA approved lending institutions, including Eastern. The FHA staff includes underwriters, processors, credit analysts, appraisers, review appraisers, clerical personnel, supervisors and a variety of others (Tr. 2220, *et seq.*; 2498).

The first step in FHA processing involves approval of the subject real property. Even before a home is placed on the market, the seller or his real estate broker can execute an FHA conditional commitment application (Tr. 2222, *et seq.*). A copy of such an application is reproduced at C. 1128. If the property complies with rather amorphous FHA standards, the FHA issues a conditional commitment with respect to the dollar amount to which it will insure a mortgage on the property.

The principal condition of a conditional commitment is that within six months after it is issued, a qualified purchaser (mortgagor) must file with the FHA, through a qualified lender, an application for a firm commitment. A copy of the firm commitment form is reproduced at C. 1129. That form is, in fact, an application for approval of the prospective mortgagor's personal credit. It requires information concerning his income, employment, outstanding obligations, etc. In conjunction with the filing of the application for a conditional commitment,

the FHA also requires that the mortgagor's employer, bank, and other persons with whom he has financial relationships, execute forms concerning the nature of those relationships. Examples of such forms are reproduced at C. 1127, *et seq.*

Finally, it is an FHA requirement that a credit agency render a factual data report with respect to the mortgagor. In the present case, the credit agency utilized by Eastern was Dun & Bradstreet, Inc. The FHA, itself, double checks the reliability of one out of every ten such reports by sending it to another credit reporting agency (Tr. 2560-7, 2993-4).

It is an FHA requirement that all applications for mortgage insurance be submitted through an "Approved Lender". All of the above noted paperwork is submitted by the mortgage applicant (frequently through a real estate broker) to the Approved Lender, which then passes it on in a package to the Federal Housing Administration for approval. At the bottom of each application for a conditional commitment and each application for a firm commitment, there appears the following statement, to be signed by a representative of the Approved Lender:

"MORTGAGEE'S CERTIFICATE:

> "The undersigned mortgagee certifies that to the best of its knowledge all statements made in this application and the supporting documents are true, correct and complete.
>
> "Signature/Title of Mortgage Officer":

At the FHA, the mortgage application package goes to a credit analyst who determines whether the documents are in proper order and whether the credit and other information comply with FHA standards. The result of his analysis is set forth on a form entitled

"Report on Application", a copy of which is reproduced at C. 1135.

Once an FHA firm commitment issues, the ordinary procedures leading to and including a title closing follow.

C. Eastern Service Corporation.

Until the events of this case, Eastern was one of the foremost brokerage institutions in the Country. Approximately fourteen solicitors, employed by Eastern, visited brokers in the Metropolitan New York Area, solicited their business, and assisted them in compiling the information required for FHA applications. The co-defendant, Melvin Cardona, was one such solicitor.

As the applications and supporting documents came into Eastern, they would go to one or the other of fifteen processing clerks. (Tr. 6060). The processing clerks would maintain contact with the brokers for the purpose of obtaining missing materials. When the processing package was completed, it would be given to petitioner, Florence Behar, who was the supervisor of the processing section, and who would sign the above noted mortgagee's certificate as the designated signatory of Eastern. The papers would then be delivered to the FHA (Tr. 10683).

It must be emphasized that petitioner was solely involved with Eastern's processing department. She had nothing to do with the other departments and she was not a stockholder of Eastern. She was simply an employee whose function it was to coordinate the processing section and to supervise the work of the employees of that section. When she signed the various documents which were submitted to the FHA, she did so solely in an organizational capacity. For that purpose she was given the purely nominal title of "Assistant Vice President". She had no power to hire or fire or to refuse to do business with any broker. (Tr. 11376-11390).

D. The False Statements.

Each of the numerous false statement counts of the indictment were based upon mortgage applications which originated with a Brooklyn real estate broker by the name of Ortrud Kapraki. As is now known, Kapraki was a person of sordid background. There is no evidence that anyone at Eastern was aware of that fact at the times relevant to this case. (Tr. 5491). Prior to trial, she entered a plea of guilty and she thereafter testified as the principal government witness.

According to Kapraki, while she was operating as a real estate broker in Brooklyn, New York, she was approached by one of Eastern's solicitors, the co-defendant Cardona. She and Cardona thereafter allegedly embarked upon a course of falsifying credit applications, employment verifications, and other supporting data for the purpose of fraudulently securing FHA commitments. Not content with Cardona's alleged advise in this regard, and without his knowledge, she even went to the extreme of creating non-existent mortgagors, signing the names of other persons on affidavits which she, herself, notarized, etc.[3] The applications were processed through Eastern.

During the course of the above noted misconduct, Kapraki became familiar with various processing and closing personnel at Eastern. It was customary for brokers to give tips to such personnel, and Kapraki followed the practice. Finding that petitioner Florence Behar was in a position to expedite the processing of applications, Kapraki allegedly began to tip her heavily. Kapraki also tipped the processing clerks assigned to her applications. (Tr. 3099-3101, 3113, 6060, 6075).

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[3] Tr. 3045, 3255-7, 3278-9, 3639 *et seq.*, 3724-34, 3754, 3887, 4227, 4526, 4640-4, 4658-62.

Kapraki's unequivocal trial testimony as a government witness is that whatever money she paid to petitioner Florence Behar was strictly in the nature of a tip, and that she never requested or bribed petitioner to do anything wrong. She paid the tip because she "appreciated" the fact that petitioner "took very good care of my cases" (Tr. 6060, 6075, 6080). She further unequivocally testified that she and Cardona went through a variety of maneuvers in an effort to keep the truth from petitioner, and that she regularly lied to petitioner (Tr. 4629, *et seq.;* 6087-8). Moreover, in an effort to prevent discovery when various of her "deals" went into default after mortgages were granted, she secretly paid substantial sums of money to an employee in Eastern's servicing section for the purpose of suppressing the fact (Tr. 5694-5700).

Reasons for Granting the Writ

I.

Petitioner was unconstitutionally denied representation by counsel of her choice when the District Court wrongfully held that her attorney was possessed of an actual conflict of interest and ordered her attorney to terminate his representation of her, despite her pleading protestations and her clear waiver of the alleged conflict.

A. The Basic Facts

This issue is discussed in the majority opinion of the Court of Appeals, *infra,* at pp. 19a-21a. It is not discussed in the dissent.

Petitioner had been an employee of Eastern for fourteen years prior to the indictment, and was earning $200.00 per week with the same employer during the

pre-trial period. Her financial resources were meager, and she was unable to afford the cost of her defense in a protracted trial.[4]

On or about October 18, 1971, petitioner was subpoenaed to appear before the grand jury which later returned the indictment herein. The principals of the Corporation, who received similar subpoenas retained an attorney to represent them. The attorney suggested that petitioner retain separate counsel and at her request he referred her to Henry J. Boitel, Esq. As noted in the opinon of the Court of Appeals it was agreed, with petitioner's full knowledge and consent, that her employer would pay Mr. Boitel's fees (19a).

At the outset, and periodically thereafter, Mr. Boitel explained to petitioner the meaning of conflict of interest and "that if [she had] any doubt whatsoever that my sole loyalty in this case ran to you, if there were any doubt in your mind whatsoever, that in fact you should get another attorney", and that "If you could not afford to pay for an attorney that you could make application to the Court and the Court would assign an attorney to represent you without charge". (C. 159-161). Never once did Mr. Boitel denigrate to her the value or ability of assigned counsel (C. 211).

About a year and four months after the filing of the indictment, the District Court directed that those attorneys representing multiple defendants appear in Court with their clients so that the Court might inquire into the question of conflict of interest. Since Mr. Boitel represented only one client, he was not one of those summoned to court. However, he appeared, revealed the fact that a co-defendant was paying his fee, and inquired "if the Court would like to question my client as to her feelings on the matter." (C. 147-8; 247, 258-60).

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[4] C. 161 177-8, 270-2.

Petitioner was sworn as a witness. Under questioning by both counsel and the Court, she clearly and unequivocally confirmed that the facts of Mr. Boitel's representation of her were with her full knowledge and consent, that from the outset of his representation of her and periodically thereafter he had fully advised her with regard to the issue of conflict of interest, and as to the fact that if she could not afford to retain an attorney the Court would assign an attorney to represent her without charge. She affirmed her full and complete confidence in the undivided loyalty of Mr. Boitel, despite various hypotheticals put to her by the Court (C. 157-178).[4a]

After a full explanation to her of possible adverse consequences, petitioner continued to state, "I still want Mr. Boitel." The following then ensued:

> "The Court: Therefore you will voluntarily waive any question that may arise at any time in the future?
>
> "[Petitioner]: That is right.
>
> "The Court: With regard to conflict of interest or as to prejudice that may occur to you and you waive also the right to claim the effective assistance of counsel.
>
> "[Petitioner]: Yes, sir, I want Mr. Boitel.
>
> "The Court: You are willing to make that waiver.
>
> "[Petitioner]: Yes, I am.
>
> "The Court: That is what I want to know, that that waiver is for now and in the future.
>
> "[Petitioner]: Yes, sir." (C. 170)."[5]

[4a] The entire transcript of the conflict of interest proceeding is set forth at C. 143-277.

[5] During the proceedings of that day, petitioner implored the Court repeatedly to permit her to continue with the services of Mr. Boitel and that she felt no conflict, in fact, would occur. (C. 167, 168, 169-70, 179, 180).

The Court, nevertheless, made a finding that a conflict of interest existed but stated that it would accept petitioner's waiver (C. 170, 186). The Court gave petitioner's counsel three days to secure a determination from the Ethics Committee of the Association of the Bar of the City of New York as to the propriety of proceeding in view of the Court's finding. Early the following morning, petitioner's counsel forwarded the transcript of the prior day's proceeding to the Ethics Committee. (C. 174-181, 188, 200-3, 249). However, that same morning, petitioner's counsel was summoned back to court, and was told that he must leave the case and that petitioner would receive other counsel (C. 199). In short, the Court had reversed itself on the question of whether it would accept petitioner's waiver.

When Mr. Boitel advised the Court of his communications with the Ethics Committee, the Court's reaction was:

> "Assuming the so-called Bar Association says it wouldn't be a conflict on your part to continue to represent her, does that reverse my decision as to my findings that I believe there is a conflict and I won't accept her waiver?" (C. 253).

Mr. Boitel proposed that the Court could remedy the situation by assigning him under the Criminal Justice Act or by paring down the one hundred fifty counts of the indictment so as to bring the length of the trial to a point where an average citizen would be able to afford the services of counsel of his choice.[6]

The Court refused to consider assigning Mr. Boitel unless Mr. Boitel returned to petitioner's employer all

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[6] Motions for a severance of defendants and/or a severance of counts, for the purpose of achieving this effect, had already been denied by the Court during the course of pre-trial proceedings.

fees he had received for work already completed over the course of the prior twenty-two months. It was made clear to the Court that the fees which had already been paid to Mr. Boitel represented compensation only for that work which had already been performed and not any work to be performed in the future (C. 214, 230-3). Since, as noted by the Court, Mr. Boitel's expenditure of time and effort in the matter had been particularly substantial (C. 231), the condition imposed by the Court upon Mr. Boitel, a sole practitioner, was an impossible one.[7] Moreover, the Court refused to entertain the request that the trial be shortened by a severance of counts or of defendants (C. 207-211).

B. The Finding of Conflict of Interest Was Error.

The right to counsel at trial is guaranteed by the Sixth Amendment. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It is clear that, "Defendants who retain counsel also have a right of Constitutional dimension to representation by counsel of their own choice . . . ." *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir., 1969); *United States* v. *Wisniewski*, 478 F.2d 274 (2d Cir., 1973).

The opinion of the Court of Appeals notes that:

> ". . . Neither [the District Judge] nor this court in any manner questioned the integrity of Mr. Boitel or his assurance that he would give [petitioner] full and proper representation regardless of who was paying him . . . ." (*Infra*, at p. 20a).[8]

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[7] The Court volunteered: "You have earned it, and I think you have earned it ten times over" (C. 232).

[8] The Government made a similar concession in its brief in the Court of Appeals at p. 147.

[Footnote continued on following page]

This case does not involve a situation where one attorney was scheduled to represent multiple defendants at a joint criminal trial or where the attorney had, at any time, ever represented someone with a possibly adverse interest.

Disciplinary Rule 5-107 of the *Code of Professional Responsibility of the American Bar Association* makes clear that, with the consent of his client, an attorney may accept compensation from a third party, so long as the attorney does not permit the third party "to direct or regulate his professional judgment in rendering such legal services." *See also*: Ethical Considerations 5-21, 22 of the *Code of Professional Responsibility*, and *Standards Relating to the Defense Function* (A.B.A. Approved Draft), § 3.5, which are to the same effect. Petitioner and her attorney complied with both the letter and the spirit of the *Code* (full disclosure and independent judgment) and of the *Standards* (explicit written understanding from the outset). The District Court was, therefore, in error in finding that an actual conflict of interest existed.

C. Petitioner Had a Right to Waive the Alleged Conflict, and She Did So.

The opinion of the Court of Appeals states that the only issue was whether petitioner "knowingly and intelligently" waived the potential conflict presented by the fact that petitioner's legal fees were being paid by her employer. (20a). Two sentences in the opinion set forth the factual basis for the Court of Appeals conclusion that such a waiver was not made:

It is noteworthy that Mr. Boitel represented petitioner in the Court of Appeals, and the Court's opinion notes: "Mr. Boitel has, it may be stated, ably represented her on appeal." (19a; see also, 47a).

> "***The [trial] court's interrogation of Mrs. Behar established that she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose. In other words, her waiver was not without strings.***" (21a) [Bracketed material added]

In fact, after closely questioning petitioner and specifically advising her with respect to the potential conflict, Judge Travia several times stated that she had made a waiver and that he was willing to accept it (C. 173, 174, 182, 184, 186, 188). Inexplicably, the Court reversed its position overnight (C. 193-215), and when petitioner continued to request that Mr. Boitel represent her and repeatedly consented to waive any conflict, the Court put to her the following loaded question which could only be answered affirmatively by any defendant in any criminal case:

> "The Court: But at a later date, if I see someone done in—for instance, I think you are not being given the effective assistance—let's use that word—for some reason that might come to mind, do you want me to sit back and do nothing or lean over and tell you 'You're in trouble lady'?
>
> "[Petitioner]: Yes." (C. 222)

That question and answer constituted the sole substance from which the Court of Appeals wove its so-called "string", while ignoring the fact that petitioner immediately thereafter persisted in acknowledging to the District Court that she was giving "an unequivocal, voluntray, knowing waiver." (C. 224).

D. If Petitioner did not Understand the Significance of a Waiver, the Court's Obligation Was to Make it Clear to Her and Not to Deprive Her of the Freedom of Choice.

Assuming, *arguendo*, that there was any basis for assuming that petitioner's waiver was not knowingly and intelligently being made, then it was the obligation of the Court to make the facts and the problem understood to her. To deprive her of the right of counsel of her choice did not implement the Constitutional guarantee; it destroyed the guarantee as to her.

In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942), where it was held that a defendant has a Constitutional right to represent himself, this Court stated as follows:

> "What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great constitutional safeguards by treating them as empty verbalisms.
>
> ". . . when the administration of the criminal law . . . is hedged about as it is by the constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of those safeguards * * * is to imprison a man in his privileges and call it the constitution." (317 U.S. at 279-280).

In *Faretta* v. *California*, — U.S. —, 95 S. Ct. 2525, at 2531 (1975), decided shortly after the argument of this case, this Court specifically reasserted the above quoted holding. *Faretta*, quoting from *Adams*, *supra*,

provides the key which both the District Court and the Court of Appeals missed with respect to the Court's obligation to leave the choice to the defendant:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (95 S. Ct. at 2541).

The opinion in *Faretta* continues:

> "Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California Code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.
>
> "In forcing Faretta, under these circumstances, to accept against his will a State-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense. * * * " (95 S. Ct. at 2541).

In an excellent analysis, the United States Court of Appeals for the Fifth Circuit, on August 7, 1975, specifically applied the *Faretta* rationale to the situation of multiple defendants who wished to be represented by the same attorney, *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975).

There appears to be no precedent for the ouster of counsel under circumstances similar to those present in this case. None of the authorities cited in the Court of Appeals opinion (19a-21a) is on point. Each involves multiple representation of defendants at trial. Not one involves the propriety of the District Court ousting counsel from the case. All make it incumbent upon the District Court to fully advise the potentially prejudiced defendant.

It is ironic that courts will find waivers of the right to counsel and of the right to remain silent when the only warning given to a defendant may be the hasty reading in a monotone of the defendant's rights from a dirty card in the backroom of a station house by an unfriendly policeman to a defendant who is handcuffed and who has just been forcibly arrested. Here, petitioner had twenty-two months of representation by Mr. Boitel to think about her course, and she repeatedly pleaded with the trial judge to permit her choice of counsel to stand. If justice and the appearance of justice are to remain even handed, it must be concluded that the District Court's action was violative of petitioner's fundamental right to representation by counsel of her choice.

E. The District Court Should Have Exercised Other Available Options.

In any event, the conflict of interest which the District Court imagined existed could have been easily cured if the District Court had granted counsel's suggestion that

he be assigned (thus eliminating the fee factor) or that the outrageously cumulative counts of the indictment be reduced so as to shorten the length of the prospective trial (thus allowing petitioner to underwrite the costs of her own defense). Rule 14 of the Federal Rules of Criminal Procedure provides that, in order to avoid prejudice, the District Court may grant a severance of counts or of defendants or may "provide whatever other relief justice requires." Since the average citizen would clearly have been unable to afford the cost of his own defense at a trial of so many cumulative counts of an indictment, involving so many defendants, the Court's powers under Rule 14 should clearly have been exercised.

We urge, therefore, that any view of the facts of this case must lead to the conclusion that petitioner was denied the effective assistance of counsel of her choice in violation of the Sixth Amendment of the United States Constitution.

II.

Petitioner was deprived of the effective assistance of assigned counsel.

A few days after petitioner's retained counsel was ousted from the case, petitioner appeared in court *alone*, pursuant to the Court's direction (C. 267, *et seq.*). After questioning her concerning her financial ability, and after indicating that she would have to prove herself innocent in order to avoid a conviction for which "You could go to jail for more than a hundred years" (C. 274), and after offering petitioner the opportunity to defend herself *pro se* at the trial, the Court appointed an attorney to represent petitioner on a "strictly a temporary basis" (C. 275).[9]

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[9] The Court's conduct suggests that the whole conflict of interest episode may well be viewed as an effort to club petitioner into a plea of guilty.

During that proceeding, government counsel stated that "Mr. Rosenkranz [the assigned attorney, who was not in court, and who had not yet met petitioner] is now actively representing an individual ——", but the Court cut the prosecutor off stating, "I talked to him and *he* doesn't think it would present a conflict." [Emphasis added] The record does not show any revelation to petitioner as to what the Court and the prosecutor were talking about. However, the government has since conceded in its brief in the Court of Appeals, at p. 152, that the fact hidden from petitioner was that the assigned attorney was then representing an FHA employee, who worked out of the Hempstead, New York office (which was central to the instant indictment), and who was then under indictment for receiving bribes from a competitor of Eastern.[9a]

* * * * *

Petitioner's retained attorney was ousted from the case just two months before the commencement of this complex nine month trial. The first four days of trial proceedings were devoted to motions for the severance of counts and to anticipated procedural and evidentiary matters (Tr. 1-281). Assigned counsel for petitioner was absent from these proceedings, with the Court's consent, since assigned counsel was then on trial in New Jersey. The Court told petitioner not to be concerned since the Court would act as her attorney for those proceedings (Tr. 7, 112-13, 238, 252). In the midst of these proceedings, petitioner suddenly addressed the Court:

> "[Petitioner]: I don't have an attorney. Whatever is going on now I don't have an attorney.
>
> "The Court: I am your lawyer right now, Mrs. Behar, don't worry." (Tr. 47).

[9a] As the opinion of the Court of Appeals noted, within another context, "Government proof on the bribery counts went to the very heart of the FHA office involved, located, as it happened, in the same building with ESC [Eastern]" (5a).

This was so, notwithstanding the fact that the counts which specifically concerned petitioner were the subject of discussion and rulings by the Court. (Tr. 182-6, 247-52). When assigned counsel made his first appearance, a number of days later, he made the following *pro forma* statement:

> "[Assigned counsel]: * * * Your Honor I would deem it sufficient if I were deemed to have made the same motions that the others have, with the same results.
>
> "The Court: Okay.
>
> "[Assigned counsel]: I think that would suffice to protect the record." (Tr. 285).

Once the actual trial commenced, the Court continually permitted attorneys to "fill in" for assigned counsel when assigned counsel was absent on other business. Thus, without protest from the Court, assigned counsel was permitted to "pinch hit" or *vice versa*, for the attorney of an FHA appraiser who had, allegedly, been bribed; and the attorney of the Eastern solicitor Cardona, against whom there was direct evidence of participation in the creation of the false statements which petitioner is alleged to have negligently or recklessly passed on to the FHA.[10] Similarly, the relative positions of the co-defendants Dunn & Bradstreet and Prescott were analogous to those of Eastern and petitioner. Nevertheless, the attorneys for those defendants were permitted to regularly substitute for each other.[11]

It is respectfully submitted that if there were any merit to the trial court's order ousting counsel of peti-

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[10] Tr. 5479, 5569, 7734, 7749, 8223, 9297, 9339, 9507, 9865, 9987, 11872, 12252, 12416, 15182 [not a complete list].

[11] Tr. 1665, 2775, 9127, 9981, 11171, 11429-30, 11682. 12438, 14228, 15360 [Not a complete list].

tioner's choice, then, *a fortiori*, the same value sought to be preserved was violated in the Court's nonchalant attitude with respect to petitioner's representation by assigned counsel. Any view of this aspect of the matter must confirm that petitioner was denied the effective assistance of counsel.

III.

The indictment herein was fatally defective since it failed to charge that petitioner had knowledge of the falsity of statements contained in the mortgage applications, and since the false statement counts of the indictment failed to particularize or even indicate which of the numerous statements were alleged to be false.

18 U.S.C. § 1010 (quoted in full *supra*, p. 7), declares it criminal if one: ". . . makes, passes, utters, or publishes any statement, *knowing the same to be false*. . ." [Emphasis added].

Count 25 of the redacted indictment, as quoted in footnote 8 of the opinion of the Court of Appeals (*infra*, at p. 15a) was typical of the numerous false statement counts of the indictment. It charged as follows:

> "On or about the 3rd day of April, 1969, within the Eastern District of New York, the defendants Rose Bernstein, also known as Rose Shorenstein, Harry Bernstein, Florence Behar, Ortrud Kapraki, Melvin Cardona and Eastern Service Corporation, for the purpose of influencing the Federal Housing Administration of the Department of Housing and Urban Development to insure a loan and advance a credit by the defendant Eastern Service Corporation, did knowingly make,

pass, utter and publish false statements in an application for mortgage insurance on property located at 416 52nd Street, Brooklyn, New York. (Title 18, United States Code, Section 1010 and Section 2)."

A. The Failure to Charge Knowledge of Falsity.

The opinion of the Court of Appeals, under the heading "Sufficiency of the False Statement Counts" states the issues raised on appeal with respect to the sufficiency of the indictment:

> "[The appellants] contend that the false statement counts under 18 U.S.C. § 1010 under which they were convicted fail sufficiently to charge a crime. More specifically, appellants argue that these counts fail to specify or identify the specific statements alleged to be false *and fail to allege the essential element of knowledge that the statements were false.*" (15a) [Bracketed material and emphasis added]

Inexplicably, the opinion treats the first issue at length but makes no further comment with respect to the second issue. Ironically, however, in justifying the failure of the indictment to specify which statements were false, the opinion makes the very argument which we make with respect to the omission of an allegation of knowledge of falsity in those counts of the indictment:

> "* * * Under 18 U.S.C. § 1010, however, the critical element of the offense is the mental state of *knowingly* making false statements. Since the 'core of criminality' is not the substance of the false statements but rather that knowing falsehoods were submitted to the FHA, appellants have not been subjected to second guessing by the prose-

> cutor or the trial jury on the particular and essential subject matter of this offense, that is, the existence of falsehoods in specific documents for specific properties." (18a) [Emphasis as in original].

As shown by Count 25, *supra*, the false statement counts merely charge that the defendants, "did knowingly make, pass, utter and publish false statements in an application for mortgage insurance. . .". There is no allegation that the defendants knew that the statements were knowingly made. *To knowingly file* a document which happens to contain a false statement, is not a crime. The crime occurs only when *it is known that the document contains false statements.* In *United States* v. *Berlin*, 472 F.2d 1002, 1007-8 (2d Cir., 1973), an opinion issued eight months before the instant trial and in which the trial prosecutor herein was also counsel, the Court of Appeals reversed a conviction due to the lack of such an allegation in the indictment.

Since the "core of [alleged] criminality" was missing from the false statement counts of the indictment, those counts were fatally defective and should have been dismissed, pursuant to the defense's specific attack in this regard prior to trial.

B. The Absence of an Indication of What Statements were False.

As noted in the opinion of the Court of Appeals:

> "[W]e can treat the assorted counts as identical since their form is the same and they differ only as to the date, the particular defendants named and the property address to which the application relates." (15a).

The Court found no violation of either the Fifth or Sixth Amendments to the United States Constitution nor

of Federal Rule of Criminal Procedure 7(c)(1), in the absolute failure of the numerous false statement counts, covering many properties, to specify what statements in the mortgage application packages were false, or even in what document they were contained. (16a). Instead, the Court of Appeals opinion found:

> " * * * The offense was fully and clearly charged, since the indictment specified the time and place of the transaction and the submission of a particular *false application* in respect to a particular piece of property." [Emphasis added].

The trouble with the Court of Appeals analysis is that this case did not involve false applications. Indeed, 18 U.S.C. § 1010 prohibits the making of "any *statement*, knowing the same to be false" [Emphasis added].

Since the indictment failed to specify the false statements which were included in the hundreds of statements that were part of any mortgage application package, the prosecutors had *carte blanche* to pick and choose any statements in the application packages, without reference to what the grand jury had concluded were false statements as to which petitioner may have engaged in culpable conduct.

It is respectfully submitted that the false statement counts herein were clearly in violation of the specificity and particularity requirements enunciated by this Court in *Untied States* v. *Mills*, 32 U.S. 138, 142 (1883); and in *Russell* v. *United States*, 369 U.S. 749, 763 (1962). This Court has held that an indictment must be a charge found by the grand jury and such a charge may not be amended or varied by the prosecutor. *Stirone* v. *United States*, 361 U.S. 212 (1960). The absence of some reasonable specification of the alleged false state-

ment provides the Court with no basis to determine whether such an amendment or variation by the prosecutor has occurred. It cannot be said, therefore, that the petitioner was brought to trial on charges returned by the grand jury, as required by the Fifth Amendment, or that the indictment adequately informed the petitioner of the nature and cause of the accusation against her, as required by the Sixth Amendment.

IV.

The District Court's charge to the jury was clearly erroneous and violative of due process of law with respect to the standard of liability as to the false statement counts of the indictment.

This issue is the subject of Circuit Judge Van Graafeiland's eighteen page dissenting opinion (*infra*, at pp. 47a-65a). We shall not impose upon the Court by merely reiterating Judge Van Graafeiland's devastating analysis of the District Court's imposition upon the petitioner of standards not found in any statute or in any legislatively authorized regulation. We, therefore, incorporate his dissent by reference herein.

Eight days after the filing of the Court of Appeals opinion herein, the Sixth Circuit issued its opinion in *United States* v. *Ekelman*, — F.2d — (March 12, 1976; No. 75-1123).

As with the Franklin Mortgage Corporation, in *Ekelman*, the activities involved in the present case were those of a "Nonsupervised Lender." (Slip opinion, at p. 5). The heart of the *Ekelman* opinion clearly demonstrates the validity of Judge Van Graafeiland's dissent:

> "As to the government's contention that Franklin recklessly failed to verify the information submitted to the VA and FHA, we agree with the district court's holding that in order for a representation to be held reckless under the common law the representation must appear to be an unqualified assertion of fact based on the personal knowledge of the party making the assertion when that party has no basis in fact for making it. The certification of truth 'to the best of my knowledge and belief' is a qualified assertion of facts represented. It does not represent that the party making the assertion has personal knowledge of the facts and is not the equivalent of an assertion such as: 'I certify that this veteran is indebted to others in the amount of $5,000.00.'
>
> * * *
>
> "In certifying the truth of the information in the application 'to the best of its knowledge and belief' Franklin did no more than assert that it had no knowledge of, nor intention to make, misrepresentations." (Slip opinion, at pp. 7-8).

As shown by the testimony of Ortrud Kapraki, the government witness who manufactured all of the false statements involved in this case, petitioner had no actual knowledge of the false statements (*supra*, p. 14). There was no evidence in this case that petitioner's function at Eastern Service Corp. was investigatory in nature. By imposing an investigatory function and obligation upon her, and by permitting the jury to conclude that the failure to exercise such a function was a basis upon which she could be held criminally liable, even in the absence of actual knowledge, the District Court's charge deprived the petitioner of her due process right

to be held liable only upon standards specifically and clearly promulgated at the time of such conduct.[12]

Conclusion

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1976
LJG

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[12] Judge Van Graafeiland persuasively argues that such error requires the reversal of all counts as to which petitioner was convicted (62a-65a). We fully agree. The majority opinion does not dispute that aspect of Judge Van Graafeiland's dissent. Instead, it argues that no error was committed.

APPENDIX A

Opinion of the Court of Appeals (March 4, 1976)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 941, 942, 943, 945—September Term, 1974.

(Argued June 9, 1975 Decided March 4, 1976.)

Docket Nos. 74-2328-29, 74-2462-64

UNITED STATES OF AMERICA,

Appellee,

v.

HARRY BERNSTEIN, ROSE BERNSTEIN, EASTERN SERVICE CORPORATION, FLORENCE BEHAR and MELVIN CARDONA,

Appellants.

Before:

FEINBERG, OAKES and VAN GRAAFEILAND,

Circuit Judges.

Appeal from judgments of conviction of conspiracy, 18 U.S.C. § 371, bribery, 18 U.S.C. § 201 and 18 U.S.C. § 2, and false statement offenses, 18 U.S.C. § 1010 and 18 U.S.C. § 2, in connection with applications for mortgage insurance loans from the FHA, by a jury in the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge,* challenging judge's failure to recuse himself; sufficiency of indictment; disqualification of counsel, joinder and denial of severance motions; sufficiency of the evidence; existence of single conspiracy;

alleged prosecutorial mismanagement; instructions of and interrogation by court; and multiplicity of counts.

Affirmed.

FRANK G. RAICHLE, Buffalo, N.Y. (Raichle, Banning, Weiss & Halpern, R. William Stephens, of counsel), *for Appellants Bernstein and Eastern Service Corp.*

HENRY J. BOITEL, New York, N.Y., *for Appellant Behar.*

JOHN A. KISEK, New York, N.Y., *for Appellant Cardone.*

RONALD E. DEPETRIS, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Paul B. Bergman, Assistant United States Attorney, of counsel; Gale A. Drexler, on the brief), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from convictions for "white collar" crimes in connection with the obtaining of Federal Housing Administration (FHA) guarantees on mortgage loans. For proof of the crimes involved, such a multiplicity of small transactions was necessary to be shown that the trial in the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge,** took over eight months with a resultant 25,000-page transcript. The three types of offenses of which appellants were found guilty include conspiracy, 18 U.S.C. § 371, substantive bribery offenses, 18 U.S.C. § 201 and 18 U.S.C. § 2, and substantive

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* Now retired.

false statement offenses in applications for mortgage insurance in violation of 18 U.S.C. § 1010 and 18 U.S.C. § 2. All appellants were convicted of conspiracy, all appellants except Melvin Cardona of bribery, and all appellants except Rose Bernstein of fase statements.[1] The appellants

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1 The conspiracy count in the redacted indictment was Count 1; the false statement counts submitted to the jury on which there were findings of guilty were 2, 4, 5, 7, 9, 10, 12, 14, 16-18, 20, 21, 23, 25, 26, 27 and 31; the bribery counts on which there were findings of guilty were 35-39, 41, 42, 44, 46, 48, 50, 51, 53, 55, 57, 59, 63 and 65. Eastern Service Corp. (ESC) was acquitted on bribery Counts 29, 33 and 61, Harry Bernstein was likewise, Rose Bernstein was acquitted on bribery Counts 29, 33 and 62, and Florence Behar was acquitted on Count 33. False statement Counts 2 and 20 were dismissed as to Harry and Rose Bernstein and Counts 25 and 50 as to Rose Bernstein.

The jury disagreed with respect to the defendants Dun & Bradstreet, Inc. (conspiracy and ten false statement counts), Arthur Prescott (conspiracy and ten false statement counts) and Herbert Cronin (conspiracy and 11 overvaluation counts). One false statement count had been dismissed on consent against the defendants Dun & Bradstreet, Inc., and Prescott at the end of the Government's case. The jury acquitted the defendant Joseph Jankowitz (conspiracy and two bribery counts). The jury was discharged by the court on July 5, 1974. Thereafter, by order dated November 25, 1974, the court granted motions by the defendants Dun & Bradstreet, Inc., and Prescott for a judgment of acquittal on the conspiracy and ten false statement counts as to which there was a hung jury.

On October 4, 1974, appellant Harry Bernstein was sentenced to a term of imprisonment of five years on the conspiracy count, five years on each of the 16 bribery counts, and two years on the false statement count, the terms to run concurrently. He was also fined $10,000 on the conspiracy count, $10,000 on each of 16 bribery counts, and $5,000 on one false statement count, all fines to run consecutively (making a total fine of $175,000). Appellant Rose Bernstein was sentenced to a term of imprisonment of four years on each count to run concurrently, and a fine of $10,000 on the conspiracy count and $10,000 on each of four bribery counts to run consecutively (making a total fine of $50,000). Appellant ESC was fined $10,000 on the conspiracy count, $5,000 on each of the 18 false statement counts, and $20,000 on each of the 18 bribery counts, all fines to run consecutively (making a total fine of $460,000). Appellant Behar was sentenced to a term of imprisonment of two years on each count to run concurrently and a fine of $1,000 on each of three bribery and 18 false statement counts to run consecutively (making a total fine of $21,000). Appellant Cardona was sentenced to a term of imprisonment of two years on each count to run

have launched a multiple attack on the convictions, their claims ranging, *inter alia,* from disqualification of the trial court and prosecutorial mismanagement to erroneous admission of evidence, insufficiency of evidence and erroneous instructions to the jury. While we find some of their arguments troublesome, we find none of them meritorious, and affirm the convictions.

I. *Statement of Facts.* The FHA is a division of the Department of Housing and Urban Development (HUD). FHA has a loan guarantee program well known to the public whereby it grants mortgage insurance to a lender-mortgagee who is thereby insured against loss if the mortgagor is unable to pay off the loan. The mortgage insurance in the instances here involved was obtained in a two-step procedure. The first step was for the mortgagee to apply to the FHA for an appraisal of the property; this was made on a "Form 2800." The scond was the mortgagee's application for approval of the mortgagor's credit; this was made on a "Form 2900" and includes certain necessary information and exhibits including a credit report, verification of employment form, and the like. If an appraisal of the property is up to sufficient value, the FHA will issue a conditional commitment which it then makes firm if the mortgagor's credit is satisfactory and approved.

Eastern Service Corporation (ESC) was a lending institution wholly owned by appellant Harry Bernstein. It would initially loan money to home buyers and subsequently sell the mortgage loans to permanent lenders, such as savings banks, pension funds, and the Federal National Mortgage Association, while being retained, however, to

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concurrently and a fine of $1,000 on each of 17 false statement counts to run consecutively (making a total fine of $17,000). Execution of sentence was stayed, and the appellants have been free on bail pending this appeal.

perform the administrative tasks involved in servicing the mortgage.

ESC made its profit from two major sources—the origination and sale of loans and the servicing of loans. On loan closings there was an origination or processing fee of one "point," *i.e.*, one per cent of the mortgage amount. In addition the corporation would charge a certain number of "points" to the real estate broker or speculator who sold the home and, after the loan closed, the mortgage would be sold by ESC to a permanent lender at a discount of a certain number of points. Thus the profit for ESC was the difference between the points charged to the broker or speculator and the points at which the loan was discounted, plus the processing fee and any servicing fee, less expenses.

The Government's case, boiled down to the bare essentials, was that the Bernsteins procured on behalf of ESC favorable FHA appraisals by virtue of bribes to FHA staff appraisers working out of the Hempstead, New York, regional office. ESC also obtained approvals of individual mortgagors' credit by virtue of a number of false credit statements submitted and certified or processed by Florence Behar, who was an assistant vice president of ESC in charge of the processing section. A number of these were solicited by Melvin Cardona, one of approximately 12 to 14 mortgage solicitors employed by ESC, who also obtained false financial reports on the mortgagors' behalf.

Government proof on the bribery counts went to the very heart of the FHA office involved, located, as it happened, in the same building with ESC. One FHA staff appraiser receiving the bribes was Edward Goodwin, who performed and reviewed appraisals in Brooklyn; he was assigned appraisal applications from time to time by coconspirator Rose Cohen and his appraisals were reviewed by defendant

Joseph Jankowitz, a senior FHA staff appraiser. Defendant Herbert Cronin, the chief underwriter of the FHA office, was responsible for overseeing all appraisals, and had the "chief underwriter's prerogative" (CUP) by which an FHA appraisal might be increased in his discretion up to a maximum of $500 on a particular property.

One of two principal real estate speculators active in Brooklyn and involved in the case was Jet Warehouse, Inc. (Jet), another wholly owned corporation of Harry Bernstein. Jet held second mortgages on a number of properties which were later refinanced by way of FHA-insured mortgages. Jet also loaned money to various real estate speculators to purchase properties, on which applications would be submitted to the FHA. The other such speculator was Ortrud Kapraki, who, along with Goodwin, was a chief Government witness and who in 1968-70 had approximately 200 closings at ESC, amounting to about five per cent of ESC's business in FHA-insured mortgages.

ESC was an FHA "approved mortgage lender" and as such, lending on an interim basis, it was able to make considerable profits with very little risk and with a limited use of capital. In the nature of economic life, once FHA mortgage insurance has been procured only low down payments are required, a permanent lender is readily available to purchase the mortgage from the interim lender, and if the mortgage goes into foreclosure the interim lender knows that the FHA will pay virtually full value on the outstanding loan so that there is no great risk of foreclosure. The risk is, in fact, for all practical purposes after assorted points are charged, close to zero. The Government proof adduced was also to the effect that at least as to the second phase of the mortgage insurance process—the mortgagor's credit—the FHA is dependent upon the approved mortgagee, and we may say upon the latter's

integrity. This is so because only the mortgagee personally interviews the mortgagor and it is the mortgagee which has the obligation to obtain verification of employment and income and to obtain other credit information regarding a mortgagor's employment and income.

It was after the inner city riots in 1966 and FHA intervention to improve the inner cities that ESC and Jet really went into what was a new market. Government proof adduced was to the effect that after an initial approach by Harry and Rose Bernstein to Edward Goodwin, the latter, with the approval of Chief Underwriter Cronin but contrary to FHA policy, went to the Bernstein office, supposedly to pick up some keys to properties. In reality he was there approached with an arrangement whereby he would obtain $50 per property on any Bernstein "2800" form applications for appraisal. When Cronin asked Goodwin how he made out on the business of the "keys," Goodwin replied that there was no problem. After that meeting in March, 1967, Goodwin was "on the take" and he and Bernstein arranged a plan whereby in order to tell which houses were Jet's, Bernstein would identify them as "ORE," meaning "our real estate," not what the parties were to mine out of the federal government. According to Goodwin's testimony, Rose Bernstein encouraged him to accept the $200 proffered by Harry Bernstein for the first four top dollar appraisals. This was only the beginning, and Government proof was that bribes were proffered by the Bernsteins and taken by Goodwin on many occasions.

Providing an initial high appraisal was only part of the bribed services rendered, however, because in several cases when ESC submitted a request for a reevaluation Cronin would return the files to Goodwin, ask him to take another look at the value, saying in words to the effect of "Is that all it's worth? Take another look." Goodwin would take

it to his desk, increase the value, and return the file to Cronin's office. Cronin would then exercise his prerogative, the CUP, and increase the value an additional $500 more. For four years, and through hundreds of these appraisals, ESC and the Bernsteins would obtain high initial appraisal, frequent upward reevaluation, and then the almost omnipresent CUP. On each of the bribery counts on which the various appellants other than Cardona were convicted, the Government proof established this with some clarity.[2] Evidence indicated that Jet held second mortgages on nine and owned three of the properties involved in the bribery counts.

Bribery also occurred in reference to applications for appraisals on a number of the so-called Kapraki properties. In the summer of 1968 the other real estate speculator, Kapraki, began to submit an increased number of applications for appraisals to ESC, and appellant Behar told her that she should have the right appraiser and introduced her to the Bernsteins. Behar told her that it was important to pay the appraisers at the going rate of $50 per property and advised the Bernsteins that since Kapraki was a volume dealer she should have staff men, *i.e.*, fulltime FHA appraisers like Goodwin, to handle her properties. Both Harry Bernstein and Rose Bernstein informed Kapraki that she would have to take care of the appraisers. Thereafter Kapraki would tell Behar when she wanted the "right appraiser," and Behar either alone or with Kapraki would speak to the Bernsteins. The Bernsteins would arrange to have either Jankowitz or Goodwin do the appraising, and either Rose Bernstein or Behar would notify Kapraki that Jankowitz or Goodwin would be appraising her properties

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2 The properties referred to in the substantive counts may not have been the only properties as to which Goodwin received payments from ESC and Harry Bernstein. *See* note 3 *infra*.

on certain dates. Pursuant to their suggestions, Kapraki would meet the appraiser each time and pay him $100 per property. As for the method by which the "right" appraisers were assigned, there was ample evidence to show that ESC appraisal applications were delivered to Herbert Cronin, who would give them to Goodwin or to Rose Cohen, with a direction to assign them to Goodwin or Jankowitz. There was evidence, indeed, that for at least two years Rose Cohen, who testified for the Government, was receiving bribes from Rose Bernstein to assign cases to particular appraisers, especially Goodwin and Jankowitz. On four of the bribery counts on which the appellants were convicted there was proof linking Rose Bernstein and Behar to Goodwin appraisals for Kapraki that were "right" and on three of those there was proof indicating Harry Bernstein's involvement with Kapraki's requests for the "right" appraiser.

The false statement counts on which ESC, Behar, Cardona and Harry Bernstein were convicted all concern false representations of employment or self-employment in ESC applications for approval of mortgage credit, supported either by an accountant's false financial statements verifying self-employment or by false verifications of employers. Government evidence established that Kapraki originally had been solicited on behalf of ESC by way of appellant Cardona, the commissioned mortgage salesman for ESC, who explained the basic FHA application procedures to her. It was in March, 1968, after a number of Kapraki's purchasers had been turned down by the FHA, that Cardona and Behar offered to assist her. Kapraki indeed offered to pay Behar $50 to $75 per case—an internal bribe—to get FHA approvals. Kapraki, with Cardona's assistance, thus commenced to create false appearances of sufficient income on FHA mortgage credit applications. After Car-

dona suggested various means of obtaining false verifications of nonexistent part-time jobs for Kapraki's applicants, Kapraki herself began to obtain these until she heard in September-October of 1968 that she was getting a "reputation" around town for such a service. Cardona then told Kapraki that they could utilize an accountant in the Bronx, Walter Blow, who would make false financial statements as to self-employment for the use of the applicants. The availability of Blow, in effect, had been announced by Cardona's sales manager at a sales meeting at ESC at which Harry Bernstein was present. In March, 1969, when Blow's statements came to be questioned, Cardona recruited another accountant, later a Government witness, to perform Blow's service. Cardona also advised Kapraki regarding assorted other techniques to insure FHA approval, such as submitting false affidavits to substantiate exaggerated down payments, forging lawyer's signatures for false escrow letters, and minimizing the number of dependents, or altering the age of the mortgagor in the application forms. Kapraki gave Cardona $95 for each set of the accountant's false financial statements and $145 for such a set plus false income tax returns, paying him usually in cash but sometimes by check, with Cardona pocketing some of the money for himself.

Appellant Behar, who took, as we said, a special interest in Kapraki's applications, no doubt because of their volume and profitability to ESC, assigned an experienced processor, one Pat Buckley, whom Kapraki agreed to pay at the rate of $50 per case, to handle them. For Behar's own aid in expediting applications, Kapraki paid $50 or $75 per property to begin with, then up to $200 per property, and finally $250 by June, 1969. Usually Kapraki left the money in cash in an envelope in Behar's desk drawer, but in a number of instances by way of checks payable to Cash,

or to Kapraki with her endorsement. These checks, with Behar's endorsements, were introduced in evidence. Behar's assistance in expediting applications went beyond a passive acceptance of their content. Behar told Kapraki to have her mortgagors sign the applications in advance in blank and, knowing that they were certifying to the truth and completeness of information which was only later typed in by Kapraki, Behar as the chief supervising processing officer of ESC would nevertheless sign the mortgagee's certification to the FHA verifying the truth of the information in the applications. Cardona and Behar also gave Kapraki blank verification of employment forms, in violation of FHA requirements. When Behar called Kapraki to tell her that Dun & Bradstreet, ESC's credit report service, was inquiring why so many of Kapraki's mortgage applicants worked at the "Bocar" service station, Behar asked, "They all work there, don't they?" But she never sent an employee of ESC out to check with this supposed employer. Cardona simply told Kapraki not to use the same place all the time.

One of the ESC people, Frank Fey, a vice president who pleaded guilty and testified for the Government, was inquisitive as to Kapraki's many delinquencies and the coincidence of her use of the same accountant, Blow, to verify so many self-employments. In late 1968, Fey told Behar, "Florence, let's stop the bullshit, you know as well as I that these deals are phonies." Behar continued to sign the mortgagee's certificates and, despite intermittent questions, even by the FHA, concerning potentially implausible information in the Kapraki applications, Behar never checked the validity of the representations beyond Kapraki's word.

Fey mentioned his concerns about fraud being involved in Kapraki's transactions to his bosses, Harry and Rose Bernstein. Despite his urging them to stop processing

Kapraki's applications both of them took the position that it was better to do the business and let the FHA decide, especially in view of the number of points ESC was charging Kapraki. The Government proof was in effect that at least by the spring of 1969, Harry and Rose Bernstein were content to have ESC process applications which their supervisor, Behar, their salesman, Cardona, and their vice president, Fey, knew were phony.

II. *Pretrial Motion to Disqualify.* Appellants timely moved with supporting affidavits to disqualify Judge Travia because he had accepted guilty pleas under other indictments and made certain comments in respect to other defendants, some of whom were named as codefendants and coconspirators of ESC, Harry Bernstein and Rose Bernstein.[3] They contend that under 28 U.S.C. § 144,[4] they presented a "sufficient affidavit" of Judge Travia's "personal

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3 The instant indictment was one of 13 returned by a grand jury against ESC and the Bernsteins, containing a total of about 800 counts and naming 50 defendants. These and several other FHA-related indictments from the same grand jury were assigned to Judge Travia. Eleven defendants involved in these prosecutions pleaded guilty prior to March 22, 1973; eight of these were codefendants and coconspirators of ESC and the Bernsteins, and six were sentenced. It was on that date that appellants ESC, Behar and the Bernsteins filed the affidavit supporting the motion for recusal, citing excerpts from the sentencing proceedings and from the guilty plea inquiries pursuant to Fed. R. Crim. P. 11.

4 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

bias or prejudice," so as to have required his recusal. *See Berger* v. *United States*, 255 U.S. 22 (1921). The question is whether the supporting affidavit is legally sufficient, *i.e.*, alleges facts which support the charge of bias and prejudice, and whether such bias and prejudice stem from an extrajudicial source. *Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968); *Rosen* v. *Sugarman*, 357 F.2d 794, 797-98 (2d Cir. 1966).

The remarks of the judge which allegedly reveal prejudice were made in the course of Rule 11 questioning of codefendants Goodwin, Kapraki, Cohen and Fey at the time of taking their pleas and in the course of sentencing, *see* note 3 *supra*. The questioning related to the nature of the conspiracy and the role of various conspirators, including the Bernsteins and ESC. The judge in those remarks characterized the conspiracy as "this terrible scheme" and "a great big scheme," and stated, "I am sure this conspiracy has cost society millions of dollars by way of payment of taxes and otherwise, and the people who get involved in these houses were dealt with very sharply. You cannot close your eyes to these things." [5]

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5 Appellants take particular umbrage at Judge Travia's reference to the "whole scheme" costing the Government "upwards of two or three hundred million dollars, and who's paying for that?," and answering his own question, "Joe Blow, the guy on the street is paying for the high living of many." They now claim that the amount of money referred to was taken from an extrajudicial source, a press report, and that there was no evidence that the Bernsteins engaged in "high living." The affidavit, however, was by no means so specific; it merely alleged that the judge had formed an opinion derived from "some speculation or information outside the record." *Hodgson* v. *Liquor Salesmen's Union Local No. 2 of State of N.Y.*, 444 F.2d 1344, 1348-49 (2d Cir. 1971). None of the statements relate to guilt or innocence of these appellants and were simply responses to the explanations or pleas for clemency of those pleading guilty or being sentenced. Moreover, the press reports referred to on appeal were part of the papers attached to motions for dismissal of the indictments on the ground of prejudicial pretrial publicity.

Each of the comments made by the judge was in the course of a judicial proceeding in the context of discussions with the defendants before him. None of them appears to have arisen from an extrajudicial source or "resulted in the formulation of an opinion on the merits not based upon what the judge has learned by his participation in the proceedings. . . ." *United States* v. *Sclafani*, 487 F.2d 245, 255 (2d Cir.) (reference at sentencing of codefendant to remaining defendants as "people who have poisoned your existence and placed you on the road of delinquency," *id.* at 252), *cert. denied*, 414 U.S. 1023 (1973). *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification. Rules against "bias" and "partiality" can never mean to require th total absence of preconception, predispositions and other mental habits, as Judge Frank said so much more felicitously in *In re Linahan, Inc.*, 138 F.2d 650, 651-52 (2d Cir. 1943). Of course such judicially acquired information or those natural preconceptions may lead a judge to feel a bias or prejudice that requires him to disqualify himself—this was still, or at least until December 5, 1974, when new 28 U.S.C. § 455 was enacted, however, a matter for the individual judge subjectively to determine. Judge Travia made no such determination here; a petition to this court for a writ of mandamus on this issue was indeed denied. The point is of no avail.[6]

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6 Neither the judge's conduct of the trial, *see* Part VIII *infra*, nor anything we said in *Winters* v. *Travia*, 495 F.2d 839 (2d Cir. 1974), is to the contrary.

III. *Sufficiency of the False Statement Counts.* Harry Bernstein, ESC, Behar and Cardona contend that the false statement counts under 18 U.S.C. § 1010[7] under which they were convicted failed sufficiently to charge a crime. More specifically, appellants argue that these counts fail to specify or identify the specific statements alleged to be false and fail to allege the essential element of knowledge that the statements were false.

For all practical purposes we can treat the assorted counts as identical since their form is the same and they differ only as to the date, the particular defendants named and the property address to which the application relates. Taking Count 25 as an example (because it is the only count in which four of these appellants were charged and convicted), we set it out in the margin.[8] We note that

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7 18 U.S.C. § 1010 provides:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully over-values any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

8 Count 25 of the redacted indictment (originally Count 20 of the superseding indictment here, 72 Cr. 587) charged as follows:

> On or about the 3rd day of April 1969, within the Eastern District of New York, the defendants ROSE BERNSTEIN, also known as Rose Shorenstein, HARRY BERNSTEIN, FLORENCE BEHAR, ORTRUD KAPRAKI, MELVIN CARDONA and EASTERN SERVICE CORPORATION, for the purpose of influencing the Federal Housing Administration of the Department of Housing and Urban Development to insure a

Count 25 identifies the particular false document involved, that is, an application for mortgage insurance with respect to a particular property. It may also be noted that the Government provided a bill of particulars which specifically identified the statements in the documents which the Government would seek to prove false at trial. A copy of the "Form 2900" for each false statement count was submitted to the jury with the statements alleged to be false circled in red by the court.

We do not find any violation of either the Fifth or Sixth Amendment to the United States Constitution or of Fed. R. Crim. P. 7(c)(1). We have "consistently sustained indictments which tracked the language of the statute and, in addition, do little more than state time and place in approximate terms." *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Trotta*, No. 75-1267 (2d Cir. Nov. 10, 1975), slip op. 473, 477; *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975). The indictments here in issue do just that.

The counts are particular in that they specify the property involved which serves to fix and identify the particular false document. It is the submission of the false document which constitutes the separate crime. *Tripp* v. *United States*, 381 F.2d 320, 321 (9th Cir. 1967); *Bins* v. *United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964). *See Cohen* v. *United States*, 178 F.2d 588, 591 (6th Cir. 1949), *cert. denied*, 339 U.S. 920 (1950). While some identification is required, *United States* v. *Borland*, 309 F. Supp. 280, 287-89 (D. Del. 1970); *United States* v.

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loan and advance of credit by the defendant EASTERN SERVICE CORPORATION, did knowingly make, pass, utter and publish false statements in an application for mortgage insurance on property located at 416 52nd Street, Brooklyn, New York. (Title 18, United States Code, § 1010 and § 2).

Devine's Milk Laboratories, Inc., 179 F. Supp. 799 (D. Mass. 1960), it is not necessary that the indictment itself go into evidentiary matters. The offense was fully and clearly charged, since the indictment specified the time and place of the transaction and the submission of a particular false application in respect to a particular piece of property. *United States* v. *Alo*, 439 F.2d 751, 756 (2d Cir.) (indictment for obstructing justice by giving "false and evasive answers" before SEC sufficient although not specifying the false and evasive answers), *cert. denied*, 404 U.S. 850 (1971). *See also United States* v. *Weiss*, 491 F.2d 460, 466 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974) (indictment for obstruction of justice by failing to produce documents before grand jury sufficient though it fails to specify in what way conduct was done corruptly).

It is, of course, for just this reason that bills of particulars to be furnished pursuant to Fed. R. Crim. P. 7(f) may be sought, *United States* v. *Debrow*, 346 U.S. 374, 376-78 (1953), and must be provided to make certain that there is adequate notice under the Sixth Amendment. *See United States* v. *Alo*, *supra*, 439 F.2d at 756 n.13. The indictment as amplified by the bill of particulars made clear to the appellants what was the nature and cause of the Government's case and gave them ample opportunity to prepare their defense. *See United States* v. *Sperling*, 506 F.2d 1323, 1344-45 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

Appellants also argue, however, that failure to specify the particular false statements in each of the separate counts allows no way of determining whether each false statement for which they were prosecuted was indeed the false statement that was considered by the grand jury. They rely on *Russell* v. *United States*, 369 U.S. 749 (1962), and *Stirone* v. *United States*, 361 U.S. 212 (1960), neither

of which, however, would require the indictments here to be held defective for failing to specify each false statement. *Stirone* held improper the admission of evidence of an activity geographically different from that specifically charged in the indictment, but no such departure in proof from the specific allegations of the appellants' acts occurred here. *Russell* required that where the specific subject matter of a question refused answer by a defendant was central to every prosecution under 2 U.S.C. § 192, because it constituted "the very core of criminality" to be proved, the indictment must specify the particular subject matter involved. Under 18 U.S.C. § 1010, however, the critical element of the offense is the mental state of *knowingly* making false statements. Since the "core of criminality" is not the substance of the false statements but rather that knowing falsehoods were submitted to the FHA, appellants have not been subjected to second guessing by the prosecutor or the trial jury on the particular and essential subject matter of this offense, that is, the existence of falsehoods in specific documents for specific properties.[9]

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9 As we said in *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969), "the omission of the means by which the offense was committed does not render the indictment insufficient." *Cf. Rosen* v. *United States*, 161 U.S. 29, 34 (1896) (defendant not entitled to know particular parts of document which grand jury had found to be obscene); *United States* v. *Ciramy*, 510 F.2d 69, 73 (2d Cir. 1975) (manner of attempted evasion of income taxes not essential to indictment). Moreover, as we have said, the court's charge on the question of false statements was perfectly proper because the jury was instructed to limit itself to determining whether there were false statements in any particular application concerning employment and income therefrom and the mortgagee's certificate; for the jury's consumption in the jury room the court circled in red the particular statements which were alleged to be false. As appellant Behar explicitly concedes in her brief, "there was never any issue as to the fact that the statements were false . . . ." The only real issue was as to knowledge.

IV. *Disqualification of Appellant Behar's Counsel.* Appellant Behar argues that she was unconstitutionally denied representation by counsel of her choice when the court found that an actual conflict of interest existed and refused to accept a waiver of any potential conflict of interest, ordering appellant's attorney to terminate his representation of her. It was the Bernsteins' attorney, Abraham Brodsky, who told Behar that he would get a lawyer for her, and indeed he did refer her to Henry Boitel, Esq. With her knowledge and consent Mr. Boitel's fee was being paid by the Bernsteins and ESC. Since Behar was a co-defendant, however, there was every possibility of a conflict of interest. A hearing was held, Mr. Boitel withdrew, appellant waived any conflict of interest, and the court found that the waiver was not knowing and intelligent. The court then asked appellant Behar to retain new counsel, and if she was unable to do so to return and the court would appoint counsel for her. When she reappeared and said she could not afford to retain counsel herself, the court assigned Richard Rosenkrantz, Esq., as her attorney. Mr. Boitel has, it may be stated, ably represented her on appeal.

We have repeatedly held, as have other courts, that representation free from conflicting interests is an essential part of the Sixth Amendment right to the effective assistance of counsel. *See Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *DeBerry*, 487 F.2d 448, 452 (2d Cir. 1973); *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 209-10 (3d Cir. 1973); *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972); *Lollar* v. *United States*, 376 F.2d 243 (D.C. Cir. 1967). Choice of counsel should not be unnecessarily obstructed by the court, *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969), but where there is a serious possibility that a

definite conflict of interest will arise, the necessities of sound judicial administration require the court to take command of the situation. *United States* v. *Dardi*, 330 F.2d 316, 335 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). The standards of the American Bar Association have become increasingly strict on this subject. *See* ABA Standards Relating to the Prosecution Function and the Defense Function § 3.5, at 211, 213 (Approved Draft 1971). *See also* P. Wilson, Pattern Rules of Court and Code Provisions 38-39 (prepared for the Committee on Implementation of Standards for the Administration of Criminal Justice of the Section of Criminal Justice of the ABA, 1975).

Plainly here there was a probability of conflicting and inconsistent defenses based upon corporate and individual liability, since as an employee of ESC Behar could well take the stand and present a defense that her employers were the guilty ones because she was only obeying the orders of her superiors and following standard office procedure. On their part, they could assert the defense that Behar had acted ultra vires and on her own. Indeed, these were the ultimate defenses advanced by each. Since the codefendants were underwriting Behar's defense, this readily apparent conflict could be seen by the court to indicate a significant probability of prejudice. The freedom of the attorney, whether in cross-examination or assertion of the defense of lack of authority, could have been inhibited and a full and uncompromised defense of his clients' interests have been seriously impaired. While neither Judge Travia nor this court in any manner questioned the integrity of Mr. Boitel or his assurance that he would give Behar full and proper representation regardless of who was paying him, the court had a special duty to make certain that any waiver was knowingly and intelligently made.[10]

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10 Judge Travia's questioning showed great sensitivity to the need for gauging the "knowing and intelligent" qualities of appellant Behar's

See United States v. *DeBerry, supra,* 487 F.2d at 452-54. *But cf. United States* v. *Wisniewski,* 478 F.2d 274, 285 (2d Cir. 1973). A waiver in this regard is not quickly or lightly to be found. *See Glasser* v. *United States, supra,* 315 U.S. at 70-71. The court's interrogation of Mrs. Behar established that she was not prepared to have the court stand by and do nothing in the event an actual prejudicial action on the part of her lawyer arose. In other words, her waiver was not without strings. The district court handled the matter, we think, quite correctly, and Mr. Boitel withdrew quite correctly. *See United States* v. *DeBerry, supra; United States* v. *Dardi, supra.* We find nothing in the record to indicate that Mr. Rosenkrantz did anything other than what highly competent counsel would do, and nothing to indicate prejudice to appellant from his short infrequent absences. On this lengthy trial all counsel pinch-hit to a limited extent for one another; daily copy of the proceedings was available and the district court kept all counsel well informed and left open the right to make any motion as counsel wished.

V. *Impermissible Joinder and Denial of Severance Motions.* Appellants Harry Bernstein, Rose Bernstein and

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waiver, and it must have been statements of hers such as the following which gave him pause:

> I am in a frightening position so far as as I am concerned. I have never before been a defendant and this case has changed, certainly, my life and my husband's life . . . this is an involved case. If an attorney is appointed and we have about two months left—it is so comprehensive, there is so much to digest, I don't know if it can be done to my comfort.
>
> . . .
>
> I am willing to sign a waiver because I know the type—at least, I feel I know the type Mr. Boitel is.
>
> In addition, he has been part of this case for sixteen months. The new attorney, whoever he might be, is an unknown factor to me. I know Mr. Boitel well and as I say, I am exceedingly frightened.

ESC all contend that their convictions on the bribery counts should be reversed on the grounds of both impermissible joinder of offenses and of defendants and erroneous denial of their severance motions. But it is well established that under Fed. R. Crim. P. 8(b)[11] joinder of multiple defendants is proper if they are alleged to have participated in the same series of acts which are part of a common scheme or plan, or connected together. Here joinder of a conspiracy count and the substantive counts arising out of the conspiracy is proper since the charge of conspiracy provides a common link and demonstrates the existence of a common plan. C. Wright, Federal Practice and Procedure (Criminal) § 144, at 322 (1974). *See Schaffer* v. *United States*, 362 U.S. 511, 514 (1960); *United States* v. *Miley*, 513 F.2d 1191, 1209 (2d Cir. 1975); *United States* v. *Granello*, 365 F.2d 990, 993-95 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967). Joinder here was clearly proper since all the substantive counts were alleged as overt acts in the conspiracy count.

On the question of severance, again the matter is one for the trial court's discretion. *See* Fed. R. Crim. P. 14; *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). *see also United States* v. *Miley*, *supra*; *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir. 1975); *United States* v. *Granello*, *supra*, 365 F.2d at 944. Before trial the Government and the court had been scrupulous in cutting down the indictment and severing defendants therefrom. *See* note 3 *supra*. This

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11 Fed. R. Crim. P. 8 provides:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

indictment originally named 21 individual and two corporate defendants and consisted of 211 counts. After assorted pretrial procedures, pleas of guilty, nolo contendere and assorted severances, the case went to trial with nine defendants. Furthermore, as a result of a motion by the Government to sever various counts and upon direction by the court to limit the number of counts, the number of counts was reduced to 65. We believe in this regard that, subject only to the legal questions whether there was here charged and proved a single conspiracy and whether there was a prejudicial variance from such a charge and the actual proof, the basic underlying admonitions of *United States* v. *Sperling, supra,* 506 F.2d at 1340-41, have been followed.

VI. *Sufficiency of the Evidence.* ESC contends that there was insufficient evidence to establish an intent to benefit it so as to support its conviction on the substantive counts charging bribery on Jet properties and aiding and abetting briberies on Kapraki properties. Appellant Rose Bernstein contends there was a failure of proof to support her conviction of aiding and abetting Kapraki's payment of bribes to Goodwin. Appellant Behar contends that there was insufficient evidence to establish the element of knowledge required to support her conviction on the substantive false statement counts. And appellant Cardona claims that his convictions were based entirely on the testimony of accomplices and asks us to reconsider our prior holdings in this regard.

Four substantive bribery counts, on each of which one or more of the appellants were convicted, involved Kapraki properties. In each case, Kapraki directly paid a $100 bribe to Goodwin. ESC contends that these bribes were solely for the benefit of Mrs. Kapraki, and hence that ESC could not have been found to have aided and abetted them. While these payments did help to secure Goodwin's ser-

vices to her, the ultimate intent of the parties was to encourage Kapraki to process her applications through ESC, which would then benefit therefrom in the "points" it charged for each deal closed. Kapraki's testimony establishes that both Rose and Harry Bernstein and Florence Behar counseled Kapraki to bribe Goodwin on these properties, and our recital of the facts indicates that the testimony from Kapraki, Goodwin, Cohen and Fey established the method used by the Bernsteins to arrange for Goodwin to be assigned to appraise these properties. By aiding and abetting the bribery, ESC and the Bernsteins successfully helped Kapraki to procure FHA approvals, and secured and kept her as a profitable client.

ESC claims that appellant Harry Bernstein intended only to benefit himself and not ESC in connection with the 14 counts involving his Jet properties, as to each of which ESC and Bernstein were convicted of bribing Goodwin. Bernstein, however, was the president and sole stockholder of ESC as well as the sole owner of Jet. Clearly he did intend to benefit himself, but his bribery had the neat effect of benefiting his interests in both capacities. ESC argues that Bernstein had two completely separate businesses, namely, operating ESC and speculating in real estate through Jet, and that his bribes may be viewed only as acts with the intent to further Jet's and thus his own profits. But evidence of the reality of an inextricably dual intent could not have been ignored by the jury: that is the intent to benefit ESC's interests as well as Jet's interests, both of whose profits would inevitably inure to Bernstein's personal benefit. Here again ESC was the approved mortgagee used to process Jet's applications, and if they were approved by the FHA, ESC would stand to make a gross profit on each property; it was in the interests of ESC to obtain a favorable appraisal from Goodwin and to have

each deal closed. Furthermore, the greater the evaluation of each property, the higher the mortgage amount might become, and accordingly the more gross profit ESC would stand to make in points charged. There was sufficient evidence for the jury to find an intent by Bernstein to further the interests of ESC, and thus to convict ESC on the Jet bribery counts.

Our summary of the evidence established clearly that Behar, who had the responsibility of signing the mortgagee's certificate on behalf of ESC, acted in the very least with a reckless disregard whether the statements made in the Form 2900 credit reports were false. She gave Kapraki blank verification of employment forms in violation of FHA regulations; she accepted Kapraki's statements that a coincidentally large number of her applicants were employed at the Bocar gas station; she ignored the warning of an experienced processor, Fey, who told her that she was accepting phony applications. She was receiving money on the side from Kapraki on each particular property; she was concerned about getting the "right" man in the credit section to examine and approve Kapraki's applications, and getting the "right" appraiser for her also; she never sent anyone out to check on the truth of the representations she was verifying, even when they were questioned by FHA or Dun & Bradstreet credit examiners. *See United States* v. *Levinson*, 405 F.2d 971, 986 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969). Although Behar may not have had the authority to stop processing Kapraki's applications, she did have authority to report irregularities. Her failure to do so in the face of Kapraki's delinquency rate and heavy use of the same accountant, Blow (whose financial statements were in March, 1969, declared permanently unacceptable at ESC by Fey), together with the other evidence outlined above, was sufficient to support Behar's conviction on the false statement counts.

Appellant Cardona seeks a ruling that a guilty verdict may not rest upon the uncorroborated testimony of accomplices, in light of our decision in *United States* v. *Taylor,* 464 F.2d 240 (2d Cir. 1972). In *Taylor,* however, this court expressly limited itself to overruling *United States* v. *Feinberg,* 140 F.2d 592 (2d Cir.), *cert. denied,* 322 U.S. 726 (1944), which had held that the quality of evidence necessary to send a case to the jury in a criminal case was the same as in civil cases. There was no discussion in *Taylor* concerning the use of accomplice testimony, and, indeed, this court has consistently held that conviction upon such testimony is proper. *See, e.g., United States* v. *Messina,* 481 F.2d 878, 881 (2d Cir. 1973), *cert. denied,* 414 U.S. 1145 (1974); *United States* v. *Ferrara,* 458 F.2d 868, 871 (2d Cir.), *cert. denied,* 408 U.S. 931 (1972). Appellant has presented no arguments as to why our prior holdings should be overruled. The testimony of Kapraki and accountant Abad was corroborated here by documentary evidence, moreover, including specifically checks representing some of Kapraki's payments to Cardona for the false financial statements concerning self-employment.

VII. *Single Conspiracy and Variance.* All appellants argue vigorously that while the indictment charged only a single conspiracy the proof at trial showed multiple conspiracies. All appellants except Cardona contend that the court failed to charge the jury properly on the single conspiracy issue. Appellant Cardona claims that since he was not involved in the bribery of FHA appraisers he is entitled to a new trial even if a single conspiracy is found. Presumably all of these arguments would be all the more vigorous in the light of our decision a short time ago in *United States* v. *Bertolotti,* No. 75-1107 *et seq.* (2d Cir. Nov. 10, 1975), slip op. 6409. There we reversed a conviction obtained in a narcotics case on the basis of a single

conspiracy on the ground that the proof showed none such but rather a series of smaller conspiracies with a resultant material variance and a spillover effect involving the transfer of guilt from members of one conspiracy to another. *But see United States* v. *Steinberg*, No. 75-1150 (2d Cir. Nov. 10, 1975), slip op. 6433, 6444. We think that the proof here was such as to entitle the jury to find but a single conspiracy. *See United States* v. *Tramunti, supra*, 513 F.2d at 1105-07; *United States* v. *Sperling, supra*.

The conspiracy count charged was a single one, to defraud the FHA by obtaining mortgage insurance on inner city properties. The two objects charged, or the two steps by which the principal object of the conspiracy were obtained, were to bribe FHA officials in connection with their appraisals and to submit to the FHA false statements of the putative mortgagor's credit, employment or income in order to obtain approval of the mortgage insurance applications. Appellants contend that the transactions surrounding the Kapraki properties constituted a different conspiracy from those concerning the Jet properties, and that these conspiracies had unrelated purposes and no connection between them. Here, however, it is not the case that two groups, one organized by Kapraki for her benefit and another by Harry Bernstein for his, existed independently of each other with the coincidence that both of them used the services of the same FHA employee, Goodwin. The pattern of conspiracy here thus does not resemble that of the independent conspiracies in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and appellants' reliance on *Kotteakos* is foreclosed by the substantial evidence of a single conspiracy.

As our review of the facts reveals, it was Harry Bernstein as president of ESC and its principal officer who was at the very center or top of the conspiracy. It was

Harry and Rose Bernstein who initiated the bribery relationship with Goodwin at the ESC office and who then provided Goodwin's services to their own client Kapraki. They were able to obtain the assignment of appraisals to Goodwin because of friendly relationships with Cronin and Cohen in the FHA office, indeed, on Cohen's part, a relationship founded in further bribery. The Bernsteins would activate this use of Goodwin upon the requests of Behar, who together with the Bernsteins informed Kapraki that she could get the "right" appraiser, but that they would have to be taken care of, that is, bribed for a high appraisal. There was ample evidence to indicate that the bribery of Goodwin and the induction of Kapraki into using his services was done with the intent to benefit ESC in profits from points charged Kapraki. ESC, it should be noted, as Jet's processor, benefited in the same way from Jet property overevaluations. Although Rose Bernstein was neither an officer nor an employee of ESC, she was intimately involved in its affairs and operations, and, whether the properties were Jet's or Kapraki's, she participated with her husband in obtaining the unlawful services of Goodwin to inflate values.

The desires of the Bernsteins to facilitate Kapraki's FHA approvals, for the benefit of ESC, extended to acquiescing in the submission of false statements, which activity was participated in most directly by ESC employees Behar and Cardona. Harry Bernstein closed his eyes to any irregularities in the Kapraki applications despite two instances of their integrity being questioned by his vice president, Fey. When Fey reported to both Bernsteins that he believed the Blow financial statements were frauds, they told him that it was up to the FHA to realize this, and Rose Bernstein reminded him of the number of points ESC was charging Kapraki for its processing. Here, unlike *Kot-*

teakos, supra, not only were the Bernsteins and ESC the central pivots of the scheme to defraud the FHA, but their activities and those of their coconspirators were linked through the common means of using the same FHA officials to achieve their common goal of benefiting ESC by defrauding the FHA. It is immaterial that Kapraki entered the scheme after it had started and that in connection with her properties there were additional elements of false statements which evolved. As the Court in *Blumenthal* v. *United States,* 332 U.S. 539 (1947), indicated, "[C]onspiracies involving such elaborate arrangements generally are not born full-grown. Rather they mature by successive stages which are necessary to bring in the essential parties." *Id.* at 556.

Appellant Behar argues that even assuming the evidence established a single conspiracy there was insufficient evidence that her participation went beyond the applications of Mrs. Kapraki. She argues that the so-called "single act doctrine" is applicable to her. *See United States* v. *Sperling, supra,* 506 F.2d at 1342; *United States* v. *Torres,* 503 F.2d 1120, 1123 (2d Cir. 1974). But Behar was involved in a number of acts. Indeed, she was convicted of 18 false statement and three bribery counts. Her connection was, moreover, near the center of the conspiracy as head of the processing section of ESC. She played an active role in bringing Kapraki into the bribery phase of the conspiracy, making it clear to Kapraki that she should get the "right appraiser." The evidence is clear that she was aware of the Bernsteins' similar arrangements with respect to non-Kapraki properties. Since she was thus aware that the scheme was broader than her participation as an individual, she is bound by the acts of her co-conspirators. *See, e.g., United States* v. *Edwards,* 366 F.2d 853, 867 (2d Cir. 1966), *cert. denied,* 386 U.S. 908 (1967).

Appellant Cardona claims that since the Government produced no evidence connecting him with the bribery-overevaluation aspect but only with the false statement phase of the conspiracy, he was substantially prejudiced by the bribery evidence and is entitled to a new trial. There was, however, ample evidence of a common goal by all the conspirators to thwart the operation of the FHA loan guaranty program in obtaining FHA insurance of ESC processed mortgages.

This is not the first time we have been presented with a single conspiracy in the furtherance of which different crimes were committed, or, indeed, in which one coconspirator joined in one of the illegal objects of the conspiracy but not in others. *See United States* v. *Levinson, supra* (VA home loan guaranty program). *See also United States* v. *Kelly,* 349 F.2d 720, 755-56 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966); *United States* v. *Benjamin,* 328 F.2d 854, 864 (2d Cir.), *cert. denied,* 377 U.S. 953 (1964) (two aspects of single scheme—selling unregistered securities and defrauding in sale of securities). As we said in *United States* v. *Borelli,* 336 F.2d 376, 384-87 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965),

> where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all or nothing basis as to all defendants.

336 F.2d at 386 n. 4. This is exactly what the trial court did in our case, just as it had omitted to do in *Borelli.* Judge Travia charged the jury that it could find Cardona to be a member of the conspiracy if the scope of his agreement included one of the objects of conspiracy, provided

that the jury first found that the single conspiracy charged did exist and that the scope of agreement made by at least two of the conspirators included both objects of the conspiracy. *See United States* v. *Levinson, supra,* 405 F.2d at 989; *United States* v. *Dardi, supra,* 330 F.2d at 327; *United States* v. *Benjamin, supra,* 328 F.2d at 864. *Cf. United States* v. *Papadakis, supra,* 510 F.2d at 297; *United States* v. *Arroyo,* 494 F.2d 1316, 1318-19 (2d Cir.), *cert. denied,* 419 U.S. 827 (1974). The jury was instructed repeatedly by the court that there was no evidence in the case connecting Cardona with the bribery object of the conspiracy. Here there was sufficient evidence to find a single continuing conspiracy by coconspirators including the Bernsteins, ESC, Behar and Kapraki, and to find that Cardona had joined with Kapraki, Abad and Blow, in a portion of the single conspiracy, the products of his frauds going unquestioned, indeed, by Behar, ESC and the Bernsteins. Here, as in *Borelli, supra,* what were required were appropriate instructions as to the scope of the agreement made by Cardona. These instructions were given here, and they were proper. As for any prejudice to Cardona, there was overwhelming evidence of his participation in the false statement frauds, making this hardly the case "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence" relating to others. *United States* v. *Miley, supra,* 513 F.2d at 1209. Cardona points out that one month at trial concerned the CUP prerogative of Cronin and one month the bribing of Goodwin. Cronin, it should be noted, was not convicted, and Cardona's own participation in the false statement scheme was so substantial that in a nine month trial we cannot find any significant prejudice from bribery testimony which the jury was instructed repeatedly did not connect Cardona to the conspiracy.

The appellants Harry and Rose Bernstein, ESC and Behar also argue that the trial court failed properly to instruct the jury that it must find a single conspiracy and not multiple conspiracies. However, the court explained the essential elements of the crime of conspiracy, focused the jury's attention in compliance with *Borelli* on the importance of determining whether each defendant became a member of the conspiracy and the scope of his or her agreement, and instructed the jury that it might find all, none or some of the defendants guilty or not guilty on the conspiracy count. The court instructed the jury that Count 1 "charges a single conspiracy having two objects or goals, and the burden is upon the Government to prove that charge as it's made beyond a reasonable doubt." In discussing membership in the conspiracy the court again emphasized that the jury must find that the single conspiracy charged in the indictment existed,[12] and in discussing the overt act element of the conspiracy the court reminded the jury that to convict it must find beyond a reasonable doubt that the single conspiracy having two objects as charged had been proved.

VIII. *Prosecutorial Mismanagement.* The claim is that the appellants were deprived of a fair trial by the sheer

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12 The court's exact words were:

> Now, in order to find that a particular defendant has become a member of the conspiracy, it is not necessary to find that the defendant knew or was aware of both objects of the alleged conspiracy if you find beyond a reasonable doubt that the scope of the particular defendant's agreement included one of the objects of the conspiracy provided that you first find that the single conspiracy charge in the indictment exists, and that the scope of the agreement made by at least any two of the defendants included both objects of the conspiracy.

The charge on conspiracy was adapted from suggested instructions concerning multiple conspiracies in E. Devitt & C. Blackmer, Federal Jury Practice and Instructions §§ 29.14, 29.15 (1970 ed.).

length of the trial allegedly caused by prosecutorial mismanagement. We have already stated, however, that the Government and the court here anticipated what was said in *United States* v. *Sperling, supra,* after the instant trial had commenced, by severing a number of defendants, reducing the number of counts, and making the case relatively manageable. *See* note 3, *supra.* It is, of course, always true that there can be some spillover and prejudice resulting when the conspiracy net is cast too wide, and draws in too many participants and too many hearsay statements. *See Kotteakos* v. *United States, supra,* 328 U.S. at 773. *See also United States* v. *Dardi, supra,* 330 F.2d at 329. The ultimate question is whether the number of defendants and complexity of the case prevents the jury from appraising the independent evidence against each defendant and meting out individual justice under the law. *See United States* v. *Stromberg,* 268 F.2d 256, 264-65 (2d Cir.), *cert. denied,* 361 U.S. 863 (1959). Here it was, of course, necessary to present both a good deal of background evidence to show the operations of the FHA and the context in which these criminal activities took place, and it was also necessary to introduce evidence as to a substantial number of transactions in order to present the true nature and scope of the criminal scheme. The bribery issues, on the other hand, ultimately boiled down to questions of credibility of the witnesses; on the false statement counts knowledge of falsity was the key issue, which was in turn dependent to a great extent on the credibility of the Government witnesses.

While it is not always necessarily wise to draw conclusions after the fact, the jury in this case does seem to have acted with extraordinary conscientiousness and sophistication. From time to time it asked for the relevant exhibits, for parts of the charge to be read, and even specifically for

the charge regarding particular counts and particular defendants, indicating that it focused on each count and each defendant separately. The jury acquitted one defendant and was not able to reach a unanimous verdict as to three other defendants[13] who were not central figures in the scheme. Appellant ESC and appellants Harry Bernstein and Rose Bernstein were each acquitted on three bribery counts. Appellant Behar was acquitted on one bribery count. Such a performance by the jury belies appellants' claims that the length of the trial and the volume and complexity of the evidence disabled its members from evaluating and applying the evidence to the individual defendants.

This kind of crime is, furthermore, extraordinarily difficult to prove. It must be proven in bits and pieces. If it is broken down into too many charges, too isolated transactions, too many fragments, the concept of the crime is impossible to comprehend. We think that a conscientious prosecution managed to delimit the issues, narrow the trial, and yet satisfactorily demonstrate a pattern which constituted the overall crime. The claim of prosecutorial mismanagement is, in our view, utterly without merit.

IX. *The District Court's Interrogation of Mrs. Cardona.* Appellant Cardona argues that he was deprived of a fair trial as a result of the court's interrogation of Mrs. Cardona. *Compare United States* v. *Nazarro*, 472 F.2d 302, 304 (2d Cir. 1973), *with United States* v. *Miley*, *supra*, 513 F.2d at 1205. *See also United States* v. *Natale*, No. 75-1276 (2d Cir. Nov. 28, 1975), slip op. 793, 804-06. This interrogation concerned events taking place after the FBI commenced its investigation of this case. In August, 1971, Cardona had met at his home with an agent of the FBI, one James Sniegocki. Later that day Kapraki came to Cardona's house in response to the latter's call and Mrs. Cardona

13 *See* note 1 *supra*.

began to relate, on direct examination, the substance of the conversation between Kapraki and Cardona. We attach extracts of this testimony in the margin.[14] Cardona asserts that the court's subsequent intervention was a "vicious" cross-examination, indicated disbelief in the witness's testimony and was an attempt to put words in her mouth.

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14 Q. What, if anything else happened during that conversation?

A. My husband keep asking her to please to talk to the FBI and to do it without her lawyer and they kept—

The Court: To do it, what?

The Witness: Without her lawyer.

The Court: Whose lawyer?

The Witness: Kapraki's lawyer.

The Court: In other words, your husband was telling her what to do without his lawyer?

The Witness: Without her lawyer.

The Court: Without her lawyer?

The Witness: According to the conversation that my husband had with Agent Sniegocki.

The Court: He wanted Mrs. Kapraki to tell Agent Sniegocki what your husband told Sniegocki, is that what you mean?

. . .

The Witness: My husband asked Ortrud Kapraki, in his own words he said, "Please, Ortrud, if you have done something wrong, it's better that you talk to the FBI by yourself, because this way you will feel better."

. . .

The Court: Then you said something in accordance with—

The Witness: Because—

The Court: Did you say that?

The Witness: Yes.

The Court: Your husband said, "In accordance with my conversation [sic].

The Witness: You want me to repeat it?

The Court: Yes.

The Witness: Yes, you want me to repeat the conversation with my husband, with Sniegocki—

. . .

The Court: I'm only interested right now in the conversation between Mrs. Kapraki, your husband and you in your living room or parlor, as you call it.

. . .

The Witness: All right. He—he said to Ortrud Kapraki that it was better for her—It was—It was better for her to confess to the FBI without her lawyer.

In our estimation, in these passages the court was not indicating its belief in the defendant's guilt or its disbelief in the witness's testimony, nor was it pushing Mrs. Cardona into altering that testimony. The testimony was unclear and it needed clarifying. At one point the court either misunderstood or did not hear the witness clearly, surely not an unforgivable sin in the course of a lengthy trial with, so far as appears, a witness who might have been difficult to understand.[15] The witness's phrase "according to the conversation that my husband had with agent Sniegocki" was also susceptible to assorted interpretations. The court was trying to determine whether Cardona was telling Mrs. Kapraki to tell the FBI what he had told the FBI agent or whether Cardona had told Kapraki that she would be better off if she confessed without a lawyer. When the court said "no, no."[16] the judge was simply indicating that he wanted the witness to testify as to the conversation with Kapraki, not the conversation with Sniegocki. In the end

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15 See note 14 *supra* regarding the context of the interrogation where the court inquired as to whose lawyer Kapraki was told to speak to the FBI without. Throughout the testimony of Mrs. Cardona, audibility and comprehension evidently were made difficult by a soft voice, rapid speech, a language barrier or a combination of these. She was asked to speak up at least five times in the course of her testimony.

16 Following the colloquy cited, note 14 *supra*, the court went on to ask:

The Court: You said earlier something about, he told her something about the FBI, something in accordance with the way I talked to him, what did you mean by that?

The Witness: According to what the Agent Sniegocki asked to my husband.

The Court: No, no.

Mr. Klein: I submit, your Honor, that is an answer.

The Witness: Yes, your Honor.

The Court: Say that again.

The Witness: According to what Agent Sniegocki have asked from my husband.

The Court: That is what your husband told her?

The Witness: Yes.

The Court: You may proceed, Mr. Klein.

even with the attempts at clarification the matter was so muddled that Cardona's counsel went over the entire conversation again. A federal district judge has, as we have repeatedly said, a duty to attempt to clarify the witness's testimony and to get the jury to understand the evidence. *See United States* v. *Natale, supra.* Judge Travia's limited intervention can sustain no claim of prejudice by Cardona.

X. *The Charge on the False Statement Counts.* Perhaps appellants' strongest argument is, especially if we judge by the dissent, in respect to the charge on the false statement counts. ESC, Harry Bernstein and Behar all contend that the trial court's charge on the element of "knowledge" applicable to the false statement counts and the false statement object of the conspiracy was erroneous. The court alternatively charged "knowledge" in terms of "conscious avoidance" and "recklessness" and it is the "recklessness" portion here attacked.[17]

Following proper instructions that specific intent was necessary and proof of mere negligence insufficient to convict, the court charged that the element of knowledge was satisfied by proof beyond a reasonable doubt that a

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17 The conscious avoidance charge given was proper under *United States* v. *Brawer*, 482 F.2d 117, 128-29 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974), and *United States* v. *Jacobs*, 475 F.2d 270, 287-88 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). However, there is no way of knowing on which basis the jury decided the case so that if the recklessness charge were erroneous the false statement counts and conspiracy count must fall.

We should add that use of the "reckless disregard" charge in this case is not inconsistent with *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975). *Bright* requires that a charge that knowledge of falsity can be inferred from reckless disregard of the truth must be "balanced" by a charge that actual belief in the truth of the statement negates knowledge of falsity. The record shows that Judge Travia expressly gave this "balanced" charge twice [C463, C511]. We do not think that he had to do this again.

defendant recklessly stated as fact things of which he was ignorant or acted with a reckless disregard of whether the statements made were true. Despite appellants' vigorous protestations to the contrary we have no difficulty in finding such a charge just as proper here as in the case of Securities Act violations. *See United States* v. *Benjamin, supra,* 328 F.2d at 862-63. *See United States* v. *Squires,* 440 F.2d 859, 863-64 (2d Cir. 1971) (in areas of fiduciary responsibility under the securities laws "persons issuing statements are under an affirmative duty to investigate, and it is entirely appropriate to include 'should have known' within the definition of 'know' [illegible] ESC, Bernstein and Behar knew that the FHA was relying on the Form 2900's submitted, and the mortgagee's certificate's declaration that the information was "true and complete to the best of its knowledge and belief" carries this obligation at least.

The problem is that the court went on to attempt to describe the duty of the parties, of ESC as an FHA-approved mortgage lender and of Bernstein and Behar as key officers of such, with the evident purpose to give the jury some standard for determining whether there was such a reckless disregard of the facts as to amount to knowledge of the falsity of the Form 2900's. Judge Travia originally said that the duty was "to insure" that the statements made in the application were true, apparently borrowing the phrase from our opinion in *United States* v. *Andreadis,* 366 F.2d 423, 430 (2d Cir. 1966) (an alternative ground in holding that the Government proved knowledge of falsity was that the defendant failed totally to discharge "affirmative duty to insure" advertising claims were true), *cert. denied,* 385 U.S. 1001 (1967). Conceiving, correctly we think, that a "duty to insure" rather overstates the mortgagee's responsibility—"reasonably to assure itself" would be more accurate—the judge below proceeded to clarify

the nature of the mortgagee's duty, describing it as "a duty to investigate and exercise proper credit judgment." [18] It is this portion of the charge to which the strongest objection is lodged as the "most aggravated" error, one compounded by the court's omission of any standard for determining good or bad credit judgment.

But, and this is what appellants overlook and the dissent misconceives, the charge did not indicate that it was a crime not to exercise "proper credit judgment" and did not equate failure to do so with reckless disregard of the truth. Rather, the charge was that the crime consisted of knowingly submitting an application containing a false statement and that proof of mere negligent falsehood was insufficient. The charge as we read it was that in determining whether there was reckless disregard of the statements' falsity such as to amount to knowledge, it was for the jury to determine whether as mortgagee ESC had affirmative duties in connection with mortgagors' loan guaranty applications. If such duties were found, the existence of potential recklessness was still a question of fact. The charge as such gave the defendants more than that to which they were entitled.

We say this because an FHA mortgagee cannot even be approved unless he is "responsible and able to service the

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18 The court charged the jury:

> [Y]ou may find that the FHA program places a duty on the mortgagee (Eastern and Harry Bernstein) to investigate and exercise proper credit judgment with respect to statements contained in applications for mortgage insurance submitted to the FHA.

The court then told the jury:

> [I]f you find that there is such an affirmative duty, then the standard of recklessness, which I mentioned earlier, is applicable to the defendant Eastern Service Corporation, which is an approved mortgagee.

Absent a finding of "such an affirmative duty" the jury was in effect directed to acquit without reaching the question of recklessness.

mortgagee properly," 12 U.S.C. §§ 1709(b)(1), 1715*l*(d)(1). A mortgagor must under the regulations establish in an approved standard application form, 24 C.F.R. § 203.11, that the mortgage payments are within his means, 24 C.F.R. §§ 203.33, 203.34, 221.1. That form specifically requires a certificate by the mortgagee that "all information in the application is true and complete to the best of its knowledge and belief." Under the analogous civil case law the mortgagee, knowing that the federal insurer is "relying on its professional judgment in a business relationship" has an affirmative duty "to use due care in providing information and advice" to the federal mortgage guarantor, *First National Bank, Henrietta* v. *Small Business Administration,* 429 F.2d 280, 287 (5th Cir. 1970); *Mt. Vernon Cooperative Bank* v. *Gleason,* 367 F.2d 289, 293 (1st Cir. 1966) (Veterans Administration). The entire scheme of FHA mortgage guaranties presupposes an honest mortgagee performing the initial credit investigation with due diligence and making the initial judgment to lend in good faith after due consideration of the facts found. The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of processing mortgage loans and signing the mortgagee's necessary certification of the application as "true and complete to the best of its knowledge and belief" did likewise. It is our view that delimiting those duties by defining them as duties "to investigate" and to use "good credit judgment" was a fair description of the responsibilities inherent in the relationship between the defendants and the FHA, as we have above described it.

Thus, to reiterate, the phrase "proper credit judgment" was used simply in the context of defining the affirmative

duties the FHA mortgagee has. In leaving to the jury the question whether any duties existed, duties which we think it is plain the mortgagee had as a matter of law, the appellants were obtaining the benefit of a charge more favorable than that to which they were entitled. Appellants rely on *United States* v. *Guterma,* 281 F.2d 742, 751-52 (2d Cir.), *cert. denied,* 364 U.S. 871 (1960), for the proposition that if the matter of duty was going to be charged at all it should have been charged as a matter of law.[19] In permitting the jury to determine the existence of the duties here, however, the court always clearly stated the crime to consist of recklessly stating facts of which the mortgagee was ignorant or acting with a reckless disregard of whether the facts stated were true. We do not see, therefore, how the appellants' substantial rights were in any way affected by the charge on exercising "proper credit judgment." If the jury decided that there were duties (to investigate and to use proper credit judgment), the appellants were no worse off than if the court had initially charged them that there were such duties as a matter of

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19 In *United States* v. *Guterma,* 281 F.2d 742, 751-52 (2d Cir.), *cert. denied,* 364 U.S. 871 (1960), the court held that it was improper for the court to leave to the jury a task "properly his own," in that case interpretation of the term "net book value" in an SEC instruction, as applied to a pledge of securities. Here, of course, appellants below had argued that the matter of duty on their part should not be charged at all. Once the court decided to leave the question of duty to the jury instead of charging it affirmatively as a matter of law, appellants' immediate reaction was as follows:

> The Court: (continuing) Or whether I would leave the question to the jury as a matter of fact to find. And I had come to the conclusion, unless the Government wishes to argue additionally, that I'm going to leave it to the jury as a question of fact.
>
> Mr. Obermayer [for Dun & Bradstreet]: Fine. My application this morning—
>
> The Court: Does the Government wish to argue on that point before—

[The balance of this colloquy is in dissent note 5.]

law, as we think it could have. If the jury decided that there were no such affirmative duties, then the appellants were, of course, much better off—they would have been entitled to acquittal according to the judge's instructions. They have in any event not been prejudiced.

XI. *The Trial Court's Intentional Omission to Marshal the Evidence.* While appellants complain of the length and prolixity of the trial, they also complain of the court's failure in the charge to summarize the evidence. This is a matter, surely, within the trial court's discretion. *United States* v. *Kahaner,* 317 F.2d 459, 479 n.12 (2d Cir.), *cert. denied,* 375 U.S. 835 (1963); *United States* v. *Gillilan,* 288 F.2d 796, 798-99 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961). That discretion was not abused. Exhaustive summations lasted 14 days. Kapraki and Goodwin had been on the stand 19 and 16 days respectively so that the jury could well weigh their credibility or lack of it. The court pointed out the principal differences in the evidence as to the appropriate defendants—*e.g.,* Rose Bernstein's lack of connection with the false statements and Cardona's lack of connection with the briberies. *Cf. United States* v. *Aloi, supra,* 511 F.2d at 598-99. It also stressed the importance of individual determinations as to each defendant on each count, a matter scrupulously observed by the jury if we are to judge from its inquiries and verdicts. *See* note 1 *and* Part VIII *supra.*

While the evidence here was complicated, or at least extensive, the issues were not. On the bribery counts, as we have observed, the issue was essentially one of credibility and on the false statement counts knowledge of the falsity. By circling in red the statements on the Form 2900 credit applications which were claimed to be false (and for all practical purposes admitted to be) the court accomplished a lot more than words in a charge could have done to direct the jury's attention to the critical facts. Here as in *United*

States v. *Hyde*, 448 F.2d 815, 842 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), a detailed review of the factual transactions "carried risks of omission, over-enumeration, over-simplification of some facts compounded by over-complication of other facts." Here, as in *United States* v. *Cohen*, 145 F.2d 82, 92 (2d Cir.) (L. Hand, *J.*), *cert. denied*, 323 U.S. 799 (1944), "If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis." Judge Hand's words in *Cohen* are equally applicable here:

> [I]n this country not only has the exercise of the power [to marshal the evidence] never been obligatory, but the power itself has been somewhat suspect. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded.

145 F.2d at 93.

XII. *Other Points.* Appellants make three complaints about the charge on aiding and abetting the briberies. The first is that the court grouped the assorted defendants associated with ESC together, as it did assorted other defendants (the FHA defendants, the credit reporting defendants). We think this made sense, however, and note also that the jury was in conclusion instructed that individual verdicts as to particular defendants on each count were called for. The second objection is that the court charged that if the jury found a payment by Kapraki was made appellants' conviction must follow; this is entirely out of context, however, because the court gave a correct charge regarding the aiding and abetting of Kapraki; only in

setting out the elements of the complicated lesser offense of giving a gratuity did the court say "you should determine with respect to each defendant whether or not the payment of money was made corruptly [elsewhere defined]," and "If you are convinced beyond a reasonable doubt that the payment was so made, then you must convict the defendant or defendants on that count." We view this as perfectly proper. The court, contrary to appellants' third argument, did charge what acts could be considered acts of aiding and abetting.[20]

Appellant Behar separately complains of prejudice by virtue of that portion of the charge that conditioned a finding of the guilt of Cardona or Harry Bernstein as aiders and abettors of the false statements upon a finding of guilt as to the principal (Behar, ESC). But it is the law that a person cannot be found guilty of aiding and abetting unless a principal whom he has aided and abetted committed the criminal act. *See Shuttlesworth* v. *City of Birmingham,* 373 U.S. 262 (1963); *United States* v. *Hoffa,* 349 F.2d 20, 40 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966). *But cf. United States* v. *Bryan,* 483 F.2d 88, 93-94 (3d Cir. 1973) (not necessary that principal be tried and convicted or even identified); *United States* v. *Provenzano,* 334 F.2d 678, 691 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964). Surely Behar and ESC were the principals in the false statement phase of the case. While the proof of Cardona's guilt was overwhelming, perhaps, there was no prejudice to Behar; it is not without significance that on one such count Behar was named and convicted while Cardona was not even

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20 The court stated that appellants were charged

> with aiding and abetting and counselling the payment of bribes to Edward Goodwin and the defendant Joseph Jankowitz and the Government claims this was done by counselling payment of monies to these men and by arranging to have them assigned to Mrs. Kapraki's cases.

named. We have previously commented on the jury's ability to view the evidence with a discriminating eye.

Finally, and this is a point on which my brothers and I disagree, appellants Harry Bernstein and ESC argue that certain of the bribery counts were multiplicitous (appellants use erroneously the term "duplicitous"). On four different occasions Bernstein paid Goodwin a lump sum for several property appraisals at $50 per appraisal, thus, for example, paying him $350 on October 6, 1967, for seven property appraisals. The problem is that while only one payment of money was made on this occasion, appellants were charged in five counts (and incidentally Bernstein fined $10,000 for each count and ESC $20,000 for each, note 1 *supra*). In totality four lump sum payments resulted in convictions on 11 counts. The question—one as to which there are no cases directly in point—is whether each lump sum payment constituted one crime or several, a single transaction or many. Appellants argue, and the writer agrees, that under 18 U.S.C. § 201(b) it is the corrupt gift which is the essential criminal act on the part of the donor, though it be with the intent to induce several criminal acts (and might be punished severally under 18 U.S.C. § 201(c) on the part of the donee).[21] *See generally Ladner* v. *United*

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21 The indictments here were for violations of 18 U.S.C. § 201(b). That section makes it a crime whenever a person

> directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

States, 358 U.S. 169, 178 (1958); *Bell* v. *United States,* 349 U.S. 81, 84 (1955) (Frankfurter, *J.*).

My colleagues take the entirely rational and different view and it is therefore the opinion of the court that separate offenses may arise out of the same transaction where each of the alleged offenses requires proof of some fact or element not required to establish the other. *See Albrecht* v. *United States,* 273 U.S. 1, 11 (1927); *United States* v. *Tarrant,* 460 F.2d 701, 704 (5th Cir. 1972); *Moeller* v. *United States,* 378 F.2d 14, 15 (5th Cir. 1967); *Newman* v. *United States,* 212 F.2d 450, 452 (6th Cir. 1954); *United States* v. *Michelson,* 165 F.2d 732 (2d Cir.), *aff'd,* 335 U.S. 469 (1948).

It was not, in the majority's view, simply the payment of the money which constituted an offense under § 201; it was also the offering or promising to pay. The proof established that Harry Bernstein promised to pay $50 for each "top dollar" appraisal which Goodwin made. The Government offered separate proof with regard to each property to establish that it had been over-valued and that, as a result, a fraud had been committed upon the United States.

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(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . . .

It is also a crime for the recipient of the bribe who

being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty . . . .

18 U.S.C. § 201(c).

That payments were thereafter made in installments which sometimes exceeded $50 did not require the number of statutory violations. The "official act" which had been improperly influenced under § 201 was the appraisal of each property on which a commitment was made for FHA mortgage insurance.

We have in short reviewed the extensive record and, with extremely careful and thorough argumentation by counsel, considered the numerous legal points arising out of this necessarily very lengthy trial. We are persuaded that the matter was handled with the greatest of care by the trial judge, with high competence by both Government and defense counsel, and with painstaking consideration of individual defendants and counts by the jury, under instructions that were, if anything, favorable to the accused. Several of the legal points were troublesome; indeed, we are not unanimous on all of them. The sentences were stiff. But these were serious crimes.

The judgment is affirmed.

VAN GRAAFEILAND, *Circuit Judge* (dissenting):

"Proper credit judgment" is a wonderfully impressive phrase, a portentous, business-like phrase, one that rolls readily off the tongue of bankers and financiers in their board rooms and at their clubs. But, what does it mean? The statute under which defendants were convicted contains no reference to it. The district judge never instructed the jurors as to its meaning. We have no idea how these twelve untutored laymen defined it. Last, but not least, my brothers in the majority fail to enlighten us with their interpretation. And yet, this phrase, undefined, unexplained and uninterpreted to this date, forms the very core

of the Government's case on the false statement counts as it was presented to the jury by the district judge.

The majority finds this to be merely "troublesome". I find it the culmination of a series of errors in the district court's charge which fairly cry for reversal. I, therefore, respectfully dissent.

Conviction of the defendants under 18 U.S.C. § 1010 required proof of three elements: the making of a false statement in the FHA application, knowing it to be false for the purpose of influencing the FHA to issue mortgage insurance. *United States* v. *Leach*, 427 F.2d 1107 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970). The Government did not contend that appellants Harry Bernstein, Florence Behar and Eastern had actual knowledge of the falsity of any of the statements at issue herein. However, the judge instructed the jury that it was unnecessary for the Government to prove to a certainty that these defendants knew a statement was false. He charged that, although knowledge could not be established by proof of mere negligence, it might be found if a defendant was aware of the high probability that a statement was false, unless that defendant actually believed that the statement was not false. He charged further on the theory of conscious avoidance.

If the District Judge had stopped at that point, I would have no fault to find. *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975); *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *United States* v. *Abrams*, 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972). However, the Judge continued on into what I conclude was error. He charged that it was a question of fact for the jury to determine if the FHA placed an affirmative duty on certain of the defendants.[1] He charged

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1 Now, it is a question of fact for you as jurors to determine from the evidence you have heard in this case—and you have

that, if there was a duty to investigate, proof of "recklessness" would satisfy the requirement of knowledge under the statute.[2] He then instructed the jury to determine as a question of fact whether the defendants Harry Bernstein, Florence Behar and Eastern had the duty to exercise "proper credit judgment" with respect to statements made in the mortgage insurance applications and to "insure" that such statements were true.[3]

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heard testimony from HUD representatives and from others, the exhibits that you will find were introduced and received in evidence, the papers from which I just read now, which the Court took judicial notice of, and the mortgagee's handbook and the FHA manual, and whatever other evidence there was, if any, in the case, is for you to determine if the FHA, of the Housing and Urban Development, places an affirmative duty on certain of the defendants in this case.

You may in making such a determination consider the regulations that have been read to you during the course of the trial, the testimony of the witnesses concerning them, the instructions concerning the applications necessary to be filed, and the papers necessary to make up the complete application. You recall they referred to that as a package, if I recall correctly. [R. 21386].

2 Finally, in the contest [sic] of this case there is a third way of satisfying the requirement of knowledge. Where a person who makes, passes, utters or publishes a false statement is under an affirmative duty to investigate the element of knowledge is satisfied by proof beyond a reasonable doubt that a defendant recklessly stated as facts things of which he was ignorant, or acted with a reckless disregard of whatever statements made were true. [R. 21425].

3 Now, in the light of the National Housing Act, part of which I read, and about which you heard testimony from Mr. Hipps, I believe, and possibly Mr. Sanders, the Federal regulations which were set forth in the eligibility requirements for approval of mortgagees who submit applications to the FHA and which set forth eligibility requirements for mortgagors, the the instructions contained in the mortgagee's handbook, the requirement that a mortgagee certify that all information in an application is true and complete to the best of its knowledge and belief, and the underlying policy of reliance by the FHA on the mortgagee to submit complete and truthful information, you may find that the FHA program places a duty on the mortgagee to investigate and

The district judge never did specifically and clearly delete the word "insure" from his charge, although even the prosecution urged that he do so. His last instructions to the jury before it retired were:

> Now, I also was asked to clarify the charge that I gave you concerning the affirmative duty.
>
> You will recall that I referred to affirmative duty as being a question of fact for you to determine if the FHA [places] an affirmative duty on various defendants. I would like to clarify the nature of that duty which you may or may not find exists.
>
> As to Eastern Service, Harry Bernstein and Florence Behar, the question is, one, was there a duty to investigate and exercise proper credit judgment with respect to statements contained in applications for mortgage insurance submitted to the FHA? [R.21618].

I have quoted the pertinent portions of the district court's charge above and in the margin so that the reader might draw his own preliminary conclusions as to its fair-

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exercise proper credit judgment with respect to statements contained in applications for mortgage insurance submitted to the FHA.

Now, if you find that there is such an affirmative duty, then the standard of recklessness, which I mentioned earlier, is applicable to the defendant Eastern Service Corporation, which is an approved mortgagee.

You should also in that regard consider what persons played a role in setting the policy of Eastern Service Corporation with respect to credit applications, and what person had the responsibility to sign the mortgagee certificate on behalf of Eastern Service Corporation. Also, in this regard you may determine whether or not the evidence shows beyond a reasonable doubt that the defendants Harry Bernstein and Florence Behar occupied such a position. You may find that any person in such a position had an affirmative duty to insure that statements made in the application were true, and if you so find, then the standard of recklessness is also applicable to such a person. [R. 21425-26].

ness and accuracy. My own comments follow under appropriate headings.

The Nature of the Offense

Defendants were indicted on conspiracy and substantive counts for alleged violations of 18 U.S.C. § 1010, which provides in pertinent part as follows:

> Whoever . . . for the purpose of influencing in any way the action of [the Federal Housing Administration], makes, passes, utters, or publishes any statement, knowing the same to be false, . . . shall be fined [and/or imprisoned].

Defendants were not indicted for violation of instructions contained in the FHA manual or mortgagee's handbook.[4] Nor could they be. The Supreme Court has, time and again, pointed out the difference between duties imposed legislatively and those imposed administratively and has held that "[w]here the charge is of crime, it must have clear legislative basis." *United States* v. *George*, 228 U.S. 14, 22 (1913). The contents of an administrative manual or handbook "cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched." *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 220 (1920). One may be convicted only for wrongful conduct "defined by statute or by regulation having legislative authority, and then only if punishment is authorized by Congress." *Viereck* v. *United States*, 318 U.S. 236, 241 (1943). As Mr. Justice Blackmun succinctly put it, while on the bench of the Eighth Circuit, "mere

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4 Although the District Court used the term "regulations", testimony introduced by the Government indicated that the procedures outlined in the FHA manual and mortgagee's handbook were not regulations, but rather instructions.

violation of a [Commodity Credit Corporation] 'policy' is not equivalent to a violation of [15 U.S.C.] § 714m(a)." *Jacobs* v. *United States*, 359 F.2d 960, 966 (8th Cir. 1966).

Section 1010 places no affirmative duty upon a mortgage insurance applicant to investigate and exercise "proper credit judgment" concerning the financial status of the mortgagor as described in the application. The majority opinion, on the contrary, does exactly that. My colleagues say that a mortgagor must "establish in an appropriate approved standard application form . . . that the mortgage payments are within his means" and that the mortgagee is required to certify that this is true to the best of its knowledge and belief. To equate defendants' failure to exercise this "proper credit judgment" with a reckless disregard of the truth, and thus with the knowledge of falsity required by § 1010, is to read something into the statute which is otherwise totally absent.

Although the dissent is said to have misconceived the judge's charge, the dissent conceives quite clearly that a defendant who is required to exercise "proper credit judgment" concerning a mortgagor's ability to make mortgage payments is held to a different standard of care than one who is not. Where such a standard is not imposed by statute or legislatively authorized regulations, it should not be created out of instructions in a manual and oral testimony. Permitting this to be done was error number one.

A number of statements are made by the majority in support of their decision to affirm with which I find myself in respectful disagreement. The first of these is Judge Oakes' statement that the defendant Behar signed certifications "verifying the truth of the information in the applications." In its unsworn applications for mortgage insurance, the mortgagee "represents" that "to the best of

its knowledge and belief" no information contained in the papers furnished is untrue, incorrect or incomplete. A statement made to the best of a person's knowledge and belief does not purport to be made on such person's actual personal knowledge and does not purport to "verify" the truth of the statement. *First National Bank* v. *Gregg*, 79 Pa. 384, 387 (1875).

The majority also says that the district court "proceeded to clarify" its charge concerning defendants' duty to "insure" the truth of statements in the application, which, it concedes, "rather overstates the mortgagee's responsibility." Clarifying is what the district judge said he was doing. However, what was required concerning the word "insure" was deletion, not clarification. In the absence of any definition of the phrase "proper credit judgment", the jury could, and in all probability did, conclude that defendants were required to exercise proper credit judgment to "insure" that the statements in the application were true. This was error number two.

I must take issue with Judge Oakes' statement that the district court's charge equating recklessness with knowledge was balanced, as required in *United States* v. *Bright*, *supra*, 517 F.2d at 588, by an additional instruction mandating acquittal if defendants actually believed that the statements made were true. In that portion of his charge dealing with conscious avoidance, the district judge did include this exculpatory clause.[5] However, that portion of

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5 Judge Oakes correctly states that the District Judge gave his "balanced" charge twice. However, this took place three days prior to the "proper judgment credit" portion of the District Judge's charge, when he was distinguishing between negligence on the one hand and reckless disregard and conscious avoidance on the other. The portion of the charge in which this occurred had nothing to do with the affirmative duty of exercising "proper credit judgment". The District Judge charged that, where such a duty existed, there was a "third way" of satisfying the requirement of knowledge. He then stated that when

the charge dealing with the duty to exercise "proper credit judgment" and "insure" the truth of statements has been set forth in full herein, and no such instruction is included.

There is a substantial difference between knowledge of falsity as used in the civil sense and in the criminal sense. *United States* v. *Cooperative Grain and Supply Co.*, 476 F.2d 47, 59 (8th Cir. 1973). Where knowledge is required for violation of a criminal statute, carelessness or lack of wisdom is not its equivalent. *Jacobs* v. *United States*, *supra*. I think our holding in *Bright* must be interpreted to mean that if a defendant actually believes that a statement is true, he cannot be convicted of a knowing falsity, regardless of how negligently he arrived at that belief. The application of this rule is especially important in a case such as this where the jury was permitted to impose duties upon the defendants derived only from administrative instructions and oral testimony. The failure of the district court to include the balancing clause required by *Bright* in the "proper credit judgment" portion of his charge was error number three.

The Function of Court and Jury

In the early days of our country, it was customary in most courts for juries to be judges of both the law and the facts. III Wharton's Criminal Procedure § 1745, at 2184 (10th ed. 1918); Foley, Instructions to Juries—Their Role in the Judicial Process, 42 Yale L.J. 194, 202 (1932).

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a defendant is under an affirmative duty to investigate, "the element of knowledge is satisfied by proof beyond a reasonable doubt that a defendant recklessly stated as facts things of which he was ignorant, or acted with a reckless disregard of whatever statements made were true." To conclude that the jury was sophisticated enough to apply the balancing requirement of *Bright* to this "third way" of proving knowledge, is to credit these twelve laymen with a prescient grasp of legal principles not readily found even among lawyers.

However, in most jurisdictions, this practice did not long survive. Over one hundred years ago, this Court firmly announced its adherence to the doctrine that the court decides the law and the jury the facts. *United States* v. *Riley*, 5 Bl. C. C. 204 (2d Cir. 1864). Finally, in 1895, in the landmark case of *Sparf* v. *United States*, 156 U.S. 51 (1895), the Supreme Court declared that this procedure would henceforth be followed in all federal courts.

I have already expressed my firm conviction that the strictures imposed upon the defendants by 18 U.S.C. § 1010 could not be enlarged upon by instructions contained in handbooks or manuals of the FHA. Whether they were so enlarged upon in this case, we will never know. This knowledge is secure in the bosom of the jury. The district court left it to the jury to determine as a question of fact from the FHA booklets "and whatever evidence there was, if any, in the case" whether defendants had the affirmative duty to investigate the financial status of mortgage applicants and exercise "proper credit judgment" with respect to statements contained in their applications.

This was not a question of fact; it was a question of law. The construction of statutes and regulations is for the court, not the jury. *United States* v. *Santiago*, —— F.2d —— (2d Cir. 1976), slip op. 6577, 6583; *United States* v. *Guterma*, 281 F.2d 742, 751-52 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960); *United States* v. *Gillilan*, 288 F.2d 796-97 (2d Cir.), *cert. denied sub nom. Apex Distributing Co.* v. *United States*, 368 U.S. 821 (1961); *Caldwell* v. *United States*, 218 F.2d 370, 372 (D.C.Cir. 1954), *cert. denied*, 349 U.S. 930 (1955). If this were not so there would be as many rules as there are verdicts. *Northern Pacific Railway Co.* v. *Finch*, 225 F. 676, 678 (D.N.D. 1915).

As Wharton points out, "if juries have any moral right to construe the law, it becomes essential to know what is

the construction they adopt." Wharton's Criminal Procedure, *supra*, at 2186. Otherwise defendants will be left rudderless and without established standards to guide them. Moreover, an appellate court will have no means of determining whether a violation of rules and regulations, as they have been interpreted by a jury, has occurred.

I cannot better point out the necessity of knowledgeable appellate review than by reference to language in the majority opinion. Judge Oakes states that "if the jury decided that there were no such affirmative duties . . . [defendants] would have been entitled to acquittal. . . ." Let us assume—we will never know—that the jury did decide there were no affirmative duties. Should defendants not have been acquitted? How can we answer this? We are left to ruminate in a vacuum. We do not know what legal duties were imposed upon these defendants by the jury; no other court will ever know, and hundreds of other FHA mortgagees who would like to comply with the law will be equally at sea.

My brothers say that defendants were not prejudiced by the submission of these issues to the jury because the affirmative duty of exercising "proper credit judgment" was imposed upon defendants as a matter of law. I must again disagree. A statement that one is obligated as a matter of law to exercise "proper credit judgment" has little meaning if one doesn't know what "proper credit judgment" is. If my brothers would come forth with a definition of this phrase and then guarantee that the jury used the same definition in finding the defendants guilty, I might agree that no prejudice existed. So long, however, as the jury was free to define for itself the nature of the duty which, the majority says, was imposed upon defendants as a matter of law, the possibility of prejudice was inescapable.

Moreover, despite a thorough review of the FHA mortgagee's handbook and pertinent Federal regulations, I find nothing in any instruction, rule or regulation which imposes a duty upon a mortgagee to investigate and exercise "proper credit judgment" with respect to the statements contained in the mortgage insurance applications. This was the responsibility of the Commissioner. 24 C.F.R. § 203.34 provides that "a mortgagor must have a general credit standing satisfactory to the Commissioner." Section 203.33 provides that a mortgagor's income may be considered adequate even though certain prescribed limitations are exceeded "if there are other, favorable compensatory factors present, as determined by the Commissioner."

Section 203.43a provides for the issuance of mortgages in older urban areas such as are involved herein, subject to a determination by the Commissioner "that the mortgage to be insured is an acceptable risk". The foreword to the mortgagee's handbook, prepared over the signature of the Commissioner, states that the eligibility of an application for mortgage insurance will be determined "only after complete analysis by the FHA field office with jurisdiction".

There is nothing in any of these provisions which places upon the mortgagee the duty of exercising credit judgment. We reach far afield when we find such a duty in the requirement that approved mortgagees must "service insured loans". 12 U.S.C. § 1709(b)(1), 1915 1(d)(1); 24 C.F.R. § 203.9. "Insured" loans have already been made and insured. Servicing them has nothing to do with the exercising of "proper credit judgment" at the time the application for mortgage insurance was being made.

We also indulge in a dangerous practice when we cite cases from the civil side of the court as "analagous" when a determination of criminal liability is being made. *First National Bank, Henrietta* v. *Small Business Administra-*

tion, 429 F.2d 280 (5th Cir. 1970), and *Mt. Vernon Cooperative Bank* v. *Gleason,* 367 F.2d 289 (1st Cir. 1966), the cases cited by the majority, illustrate this very well. *First National* was an action to recover on a loan guaranty agreement, and the Court of Appeals held that the District Court erred in not submitting to the jury the question of whether the bank had been guilty of negligent misrepresentations in connection with the loan application. *Mount Vernon* was an action for declaratory judgment to determine the liability of the Veterans Administration under a loan guaranty certificate, the application for which had been forged. The regulations governing the issuance of such certificates provide that there shall be no liability where the application therefor is a forgery. The Court held that the Administrator might rely on this disclaimer of liability. For purposes of determining the guilt of appellants in this criminal case, these decisions, I think, are not analogous.

We should also be careful not to transpose the fiduciary responsibilities imposed by the securities laws into a completely alien field. *United States* v. *Squires,* 440 F.2d 859, 863 (2d Cir. 1971). Where, as here, the FHA requires that it be furnished credit reports from established credit agencies such as Dun and Bradstreet, it can hardly be said to be relying upon the credit acumen of the mortgagee. Where the FHA furnishes a "Verification of Deposit" form for completion by the mortgagor's bank and a "Verification of Employment" form for completion by the mortgagor's employer, it certainly does not expect the mortgagee to go beyond the information contained in these forms and the Dun and Bradstreet credit report and conduct a credit investigation of its own. If it did so expect, it did not say so. The charge of the trial court which permitted the jury to find such a duty was error number four.

The record is clear that the issue of "proper credit judgment" was inserted in the case at the instance of the

Government and that it was the Government which wanted this issue submitted to the jury as a question of fact. The defendants opposed this from the outset, and the transcript is replete with illustrations of this fact. Defense counsel advised the court, for example, that the question of affirmative duty "was a legal issue rather than one that should be phrased for the jury to decide"; that it was "an affirmative legal duty, and it seems to me that the legal duty is to be determined solely by the Court and not by the jury"; that "its existence or lack of existence was a matter of law which must necessarily be determined in the first instance by the Court".

The trial judge did not decide upon his course of action until defense counsel Obermaier was in the middle of his summation. The colloquy between court and counsel at this point is set forth in full in the margin.[6] I do not con-

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6 MR. DEPETRIS [Asst. U.S. Atty.]: As I understand it you would tell the jury, you may find that there is an affirmative duty if you so find that the principle of recklessness—

THE COURT: Yes, instead of as a question of law. Because I have checked not only the National Housing Act, but all the regulations that have been discussed in the course of the trial and—and the argument produced by Defense Counsel—I don't remember which it was particularly—to the effect that there is no specific requirement in any of them stating that there is an affirmative duty on the part of anyone, except insofar as the mortgagee handbook is concerned which could be deduced such a duty insofar as the mortgagee is concerned, and those dealing with the application—the 2900 form. But I found nothing directly along the lines that might be applicable either to Dun & Bradstreet, Prescott &—and I just heard somebody quirp Eastern Service. But of course, I am not thinking about that.

Mr. SOVIERO: I wasn't quirping.

THE COURT: I know you weren't but you did say something in there. But Eastern Service I am categorizing as a mortgagee approved lender. And they are at least in command of, in possession of the mortgagee handbook from which some decisions could be arrived at by the jury to the effect that there is some duty owing to the FHA. Whom I meant, however, was Cronin, I believe.

Now, if there is anything further, Mr. DePetris, I would be very happy to hear you before I make my decision final.

strue this exchange between court and counsel as a request by the defendants to charge affirmative duty as a question

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Mr. DePetris: No, Your Honor. In fact, that was the way we had initially submitted it in our request to charge. That is, leave it as a question of fact for the jury. And it was only that Defense Counsel requested that it be charged as a question as a matter of law. If Your Honor prefers to leave it to the question of the jury, then that's all right with us.

So as I understand it, they will be told they may find a duty—an affirmative duty. And if they do find, then the principle of recklessness—

The Court: Then it would apply.

Mr. DePetris: Fine.

The Court: But it's up to them to find.

Mr. Obermayer: Our application this morning was without prejudice to our position that it's not an appropriate subject for the jury.

The Court: All right.

Mr. Wall: Mr. Prescott will join in Dun & Bradstreet's motion.

The Court: Well, their position, if I understand it correctly, is that—

Mr. Wall: It's a question of law which should be charged to the jury.

The Court: Yes.

Mr. DePetris: Wait. As I understand it—

The Court: Mr. Obermeyer and Mr. Prescott—rather Mr. Obermayer and Mr. Wall both argue that it should be a question of law for the Court to decide and not for the jury to decide as a matter of fact.

Mr. Obermayer: Our position is—at least my position is that under these circumstances no affirmative duty arises, and the whole subject of affirmative duty should not be discussed with the jury. We understand the Court will discuss it with the jury and we are bound by Court's ruling in that regard.

The Court: All right.

Mr. DePetris: Is it your position that it should be charged one way or another as a matter of law?

The Court: No. He is saying not to take up the subject at all.

Mr. DePetris: Fine.

The Court: Do you understand that?

Mr. DePetris: Yes.

Mr. Obermayer: That's fine.

Mr. Wall: That is precisely Mr. Prescott's position.

Mr. Rosenkranz: Mrs. Behar joins in that.

The Court: Mr. Rosenkranz.

Mr. McEvoy, on behalf of Eastern Service and Harry Bernstein.

All counsel join? Is there any counsel who does not join?

of fact. The defendants' subsequent exceptions to the charge as given clearly indicate that they did not so construe it. Assuming at the worst that defendants did not make their position clear to the trial judge, I would, nonetheless, conclude that his charge was so deficient and defective in material respects as to amount to plain error. *United States* v. *Clark*, 475 F.2d 240, 250 (2d Cir. 1973).

What Is Proper Credit Judgment?

On October 3, 1967, Mr. P. N. Brownstein, Assistant Secretary-Commissioner, spoke at an FHA director's conference. He said that the requirement for a finding of economic soundness in riot or riot-prone areas was being eliminated. He stated that the FHA "must be willing to take the risks necessary to accomplish the urgent job of assisting and encouraging private enterprise to house low- and moderate-income families, and to revive the inner city." He told the directors "we should be prepared to take the risks that are justified and prudent in the light of the urgent social objectives to be achieved." C#1164-78. These were the professed aims of the FHA, made in accordance with a national housing policy seeking the elimination of sub-standard and other inadequate housing. 42 U.S.C. § 1441.

MR. SOVIERO: I don't join because I am not involved in any false statement counts. But I am named in the conspiracy count so I join.
THE COURT: All right. Mr. Soviero, well, you weren't—
MR. SOVIERO: Well—
THE COURT: Your client.
MR. SOVIERO: It's getting to feel that way, Your Honor.
THE COURT: All right. Then all counsel join. All right. I suppose, Mr. McEvoy, you join on behalf of Mr.—
MR. MCEVOY: Mr. Bernstein.
THE COURT: On behalf of Mr. Brodsky.
MR. MCEVOY: Yes.
THE COURT: All right. May we proceed then. [R. 19770-74].

What, then, is the standard by which the "proper credit judgment" required of the defendants should be measured? Is it that which would be exercised by a prudent private investor, or should the broad social purposes of the National Housing Program be taken into account? The district court didn't say, and we, like the jury, are left in doubt. Such vagueness is fatal to the Government's position, because the jury was without any clearly defined standards by which defendants' guilt could be determined. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Smith* v. *Goguen*, 415 U.S. 566 (1974).

In *United States* v *Clark, supra,* 475 F.2d at 249, we quoted with approval Judge Hand's statement in *United States* v. *Gillilan, supra,* 288 F.2d at 797, that "the statute requires some definition of the meaning of the words which may not be left to the jury." In *Clark,* we found error in the trial judge's failure to charge the meaning of "specific intent" and "inference", which seem to me to be more easily defined than "proper credit judgment". Where a jury, as in the instant case, is left to operate "almost completely in the dark", *United States* v. *Howard,* 506 F.2d 1131, 1134 (2d Cir. 1974), in an area as vital as this, it cannot be said that defendants have been fairly tried and convicted. This was error number five.

Conclusion

In permitting the jury to determine as a question of fact whether the defendants Harry Bernstein, Eastern Service Corporation and Florence Behar were to be held to an undefined standard of exercising "proper credit judgment", the district court committed prejudicial error which requires reversal of the conviction of these defendants on the false statement counts.

Moreover, the prejudicial effects of the district court's errors cannot be limited to these charges and these defendants. Because the conspiracy charge against all defendants encompassed both bribery and the filing of false statements, I believe we have no alternative but to reverse all of the conspiracy convictions. The court's erroneous charge on the making of false statements must be held to have tainted the conspiracy convictions as well.

If the convictions on the conspiracy count are reversed, we are presented with the question of whether defendants were prejudiced by the eight months' trial involving 64 other counts, held together only by the charge of conspiracy. I agree with the majority that, so long as the conspiracy provided a link sufficient to demonstrate a common scheme or plan for joinder purposes, the question of prejudice, while close, was within the trial court's discretion. *United States* v. *Miley*, 513 F.2d 1191, 1209 (2d Cir. 1975). Moreover, there is no "hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law." *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960). However, the trial judge does have a continuing duty at all stages of the trial to grant a severance if prejudice does appear, *id.* at 516, and I think the duty to remedy prejudice becomes ours if such prejudice does not become apparent until the matter reaches our court.

In *United States* v. *Branker*, 395 F.2d 881, 887 (2d Cir. 1968), *cert. denied sub nom. Lacey* v. *United States*, 393 U.S. 1029 (1969), where the conspiracy count was dismissed at the close of the government's case, we said:

> Originally twelve defendants and six coconspirators were named in eighty-four counts. The eight defendants who were tried were named in eighty substantive counts charging violation of six criminal statutes. While it is true that this court has on several occasions

> sustained convictions on substantive counts after dismissal of a conspiracy count relied upon to justify joinder, [citations omitted], we are not aware of any such case in which the number of counts even approached the number involved here. It is obvious that as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind. [Citations omitted].
>
> This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another." [Citations omitted].

This quotation describes exactly the situation which existed in the trial below. The relationship between the false statement counts and the bribery counts was tenuous at best, and there was bound to be an adverse spillover effect from one to the other in this unduly long trial. *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). I will give only two illustrations. Appellant Rose Bernstein was forced to sit through eight months of unrelated and prejudicial testimony in order to be convicted on four counts of aiding and abetting bribery. Appellant Cardona was required to wait five months after the Government completed its proof against him before he was able to offer any testimony in his own defense. I cannot escape the "definite and firm

conviction" that defendants may have been prejudiced by the trial resulting from the conspiracy charge which, in my opinion, cannot stand, and therefore their convictions must be reversed. See 1 Wright, Federal Practice and Procedure § 227, at 470 (1969).

Following his conviction, Mr. Bernstein, a reputable "white collar" businessman, was sentenced to prison for five years. For this 67 year old man who had had a heart attack during the course of the trial, this could well be a life sentence. His 65 year old wife was given a four year sentence. Fines levied against them and their company totaled $685,000. Although the other defendants were treated somewhat more kindly by the District Judge, this was, indeed, a vigorous performance of his duties. Before I can join my colleagues in approving this result, I must be more satisfied that I now am that the defendants received a fair trial.

I dissent.

APPENDIX "B"

Order of Court of Appeals Denying Rehearing And Amending Prior Dissenting Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2328, 74-2329

74-2462, 74-2464

UNITED STATES OF AMERICA,

Appellee,

—against—

HARRY BERNSTEIN, ROSE BERNSTEIN, Eastern Service Corporation, FLORENCE BEHAR and MELVIN CARDONA,

Appellants.

Upon the undated petition for rehearing of appellants Harry Bernstein, Rose Bernstein and Eastern Service Corporation, filed March 31, 1976, the petition for rehearing of appellant Florence Behar, dated April 1, 1976, and the petition for rehearing of appellant Melvin Cardona, dated April 1, 1976, it is hereby ordered that:

1. The petitions for rehearing are denied.

2. The separate opinion of Judge Van Graafeiland is amended as follows. (Prior to the filing of the petitions for rehearing, the Clerk's office had been advised to make the following changes, but had not yet done so; they are accordingly now being done by order):

(a) At slip op. 6683, footnote 5, line 3, the phrase "proper judgment credit" should be "proper credit judgment."

Appendix "B"—Order of Court of Appeals Denying Rehearing and Amending Prior Dissenting Opinion

(b) At slip op. 6695, at the end of the opinion, after the words "I dissent," footnote 7 is added reading as follows:

> Among the issues which divided this panel was the claimed multiplicity of bribery counts. In order that disposition may be made of this issue, I join in so much of the opinion and judgment as holds that such counts were not multiplicitous.

WILFRED FEINBERG
JAMES L. OAKES
ELLSWORTH VAN GRAAFEILAND

Dated: May 14, 1976

APPENDIX "C"

Order of Court of Appeals Denying Rehearing *In Banc* (May 14, 1976)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

74-2328

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

HARRY BERNSTEIN, ROSE BERNSTEIN, aka ROSE SHORENSTEIN, EASTERN SERVICE CORPORATION, DUN & BRADSTREET, INC., HERBERT CRONIN, FLORENCE BEHAR, FRANK FEY, ARTHUR PRESCOTT, ORTRUD KAPRAKI, MELVIN CARDONA, PATRICIA BUCKLY, EDWARD GOODWIN, JOSEPH JANKOWITZ, FRANK DREIS, GREVILLE HARVEY, ROSE COHEN, JOSEPH MONTI, IRVING FIGOWITZ, RALPH GONIAS, HAROLD KELLER, MANUEL CARPIO, DOUGLAS HOLLENBACH and RICHARD E. BELL,
Defendants,

HARRY BERNSTEIN, ROSE BERNSTEIN, aka ROSE SHORENSTEIN, EASTERN SERVICE CORPORATION, FLORENCE BEHAR, MELVIN CARDONA,
Defendants-Appellants.

Appendix "C"—Order of Court of Appeals Denying Rehearing In Banc (May 14, 1976)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Florence Behar, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1810

FLORENCE BEHAR,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER FLORENCE BEHAR

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1810

FLORENCE BEHAR,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER FLORENCE BEHAR

Petitioner, Florence Behar, replies as follows to the brief for the United States in opposition [hereinafter, "Brief of the United States"], and reasserts all arguments contained in her petition. Since the Brief of the United States has chosen to cite to the opinion of the Court of Appeals, as contained in the appendix of the petitioners in Number 75-1798 [hereinafter, "Bernstein Pet. App."], we shall do likewise in order to avoid confusion.

ARGUMENT

I.

The District Court's charge to the jury was clearly erroneous and violative of due process of law with respect to the standard of liability as to the false statement counts of the indictment.*

The Brief of the United States has failed to focus upon the substantial issue which is presented by the Court's charge to the jury in the present case, to wit: legal responsibility which devolves upon one who executes a "knowledge and belief" certificate.

As shown by the facts set forth at pp. 9-14 of our petition, the petitioner Behar, being the processing supervisor at Eastern Service Corporation, would, on a daily basis, receive many packages containing applications for mortgage insurance and numerous supporting documents. She would review each package for completeness, i.e., to determine whether each of the forms had been completed and executed, and she would then sign a certificate which was printed at the bottom of the application form. An application for a "Property Appraisal and Commitment" (Form 2800, which is set forth in Volume VI of the Appellants' Appendix in the Court of Appeals, at p. C. 1129) contained the following certificate:

> "Mortgagee's certificate: The undersigned mortgagee certifies that *to the best of its knowledge* all statements made in this application and the supporting documents are true, correct and complete.

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* This issue is discussed in the majority opinion of the Court of Appeals at C. 42-47; in the dissenting opinion of Circuit Judge Van Graafeland at C. 53-73; in Florence Behar's petition for a writ of certiorari at pp. 31-33; and in the Brief for the United States at pp. 16-23.

> "Signature/title of mortgage officer:" [Emphasis added].

The Application for Credit Approval (Form 2900, set forth in Volume VI of the Appellants' Appendix in the Court of Appeals, at p. C. 1130) contains the following certificate:

> "Mortgagee's certificate—The mortgagee certifies that all information in this application is true and complete *to the best of its knowledge and belief.* Signature "
> [Emphasis added].

Separate and apart from Federally insured mortgage programs, there must be thousands of similar certificates signed each day by persons transacting business with the United States government. Since petitioner Behar's liability was predicated upon her execution of those certificates, the manner in which the District Court and the Court of Appeals have permitted a finding of "constructive knowledge" has far-reaching ramifications for all citizens and business enterprises who engage in transactions with the Federal government.

The District Court's charge to the jury, as set forth in Judge Van Graafieland's dissent, at pp. C. 54-57, and in the Brief of the United States, at pp. 13-15, reveals that the jury was instructed that the knowledge requirement of 18 U.S.C. § 1010 could be established in any one of four ways: actual knowledge, awareness of high probability of falsity, conscious avoidance of what would otherwise have been obvious, and recklessness. The evidence did not show, nor did the government urge at trial or upon appeal, that petitioner Behar had actual knowledge of the false statements contained in the applications which she certified. Moreover, the Court of Appeals held that

". . . there is no way of knowing on which basis the jury decided the case so that if the recklessness charge were erroneous the false statement counts and conspiracy count must fall." (Bernstein Pet. App. C. 42, N. 17).

The recklessness theory upon which the jury was permitted to convict was made dependent by the trial court upon the jury making certain findings of fact concerning whether one who executes such a certificate has: (a) a duty to investigate the truth of allegations made in the body of the application; (b) a duty to "exercise proper credit judgment" in investigating the facts and assessing the application; and (c) "an affirmative duty to insure that statements made in the application were true". (Bernstein Pet. App. C. 56, N. 3).

In finding the petitioner Behar guilty, the jury may well have made such findings. The question, then, is whether any legal and factual basis existed which would support such a theory of liability.

The opinion of the Court of Appeals found such a legal basis upon the theory that:

> "The entire scheme of FHA mortgage guarantees presupposes an honest mortgagee performing the initial credit investigation with due diligence and making the initial judgment to lend in good faith after due consideration of the facts found. The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of processing mortgage loans and signing the mortgagee's necessary certification of the application as 'true and complete to the best of its knowledge and belief' did likewise. It is our view

> that delimiting those duties by defining them as duties 'to investigate' and to use 'good credit judgment' was a fair description of the responsibilities inherent in the relationship between the defendants and the FHA * * *." (Bernstein Pet. App. at C. 45-46).

The Brief of the United States relies upon the above quoted Court of Appeals analysis, and further argues that an implicit *quid pro quo* for "virtually risk-free benefits of participation in the Federal program" was that mortgagees "take reasonable steps to assure themselves of the truth of information set forth in the applications they submit to FHA." (Brief of the United States, at p. 20).

As appealing as these analyses may be, from the point of view of economic or administrative desirability, they simply do not find support in any legislative, regulatory or other articulated statement of obligation or affirmative duty imposed upon FHA approved lenders.

The Brief of the United States argues that "The correctness of the Court of Appeals' decision is demonstrated both by the governing legislation and by the practical relationship that exists between the FHA and mortgagees [approved lenders] who participate in the Federal mortgage insurance program." (Brief of the United States, at p. 20). However, the Brief of the United States is remarkably devoid of any reference to such affirmative duties in "the governing legislation". Its speculation as to the "practical relationship" omits any reference to the fact that, with respect to each application, pursuant to FHA regulations, there was provided to the FHA a Dun & Bradstreet credit report, verifications of applicants' bank deposits, and verifications of applicants' employment (Bernstein Pet. App., at C. 66). Moreover, the Brief of the United States omits mention of the fact that once an

application is submitted, it must run the gamut of FHA staff underwriters, processors, credit analysts, appraisers, review appraisers, clerical personnel, supervisors, etc., who make the final judgment as to whether an application will be approved (Tr. 2220, et seq.; *see also*: Behar petition, at pp. 10-12).

It is of no little significance that no witness at trial, nor the District Court in its charge to the jury, nor the Court of Appeals, nor the Brief of the United States attempts to define the concept of "proper credit judgment" (*See*: Judge Van Graaffieland's analysis of that omission in Bernstein Pet. App., at C. 53-54, C. 63-70).

* * *

The Brief of the United States make vain effort to distinguish the holding of the United States Court of Appeals for the Sixth Circuit in *United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545 (6th Cir., 1976). (Brief of the United States, at pp. 21-23).* In doing so, the Brief of the United States implies that some kind of a material difference exists between applications for mortgage insurance under the Veteran's Administration program and applications under the FHA program. In fact, there is

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* It is noteworthy that, on July 27, 1976, the Solicitor General wrote to the Clerk of this Court, and advanced the following reason for an enlargement of time within which to file the Government's response to the instant petition:

> "The government is currently preparing a petition for a writ of certiorari in the case of *United States* v. *Ekelman*, C.A. 6 No. 75-1123, decided March 12, 1976, which involves an issue closely related to one presented by the instant petitions. This application for an extension of time is necessary so that we may further consider and formulate our response to the instant petitions in light of our position in *Ekelman*."

In fact, the Government appears to have subsequently decided not to seek a review by this Court of the Ekelman holding, and not petition for a writ of certiorari was filed by the Government.

no such material difference, and none appears from the analysis set forth in the *Ekelman* opinion. (*See*: Brief of the United States, at p. 21, fn. 15).

The Brief of the United States further suggests that *Ekelman* is distinguishable because it involved "False Claims Act liability with regard to the Veteran's Administration Loan program rather than criminal liability under 18 U.S.C. § 1010 with regard to an FHA program." (Brief of the United States, at p. 22). It is transparently absurd for the government to argue that a lower threshold of proof or a less clearly defined standard of liability is applicable in criminal proceedings than in civil proceedings.

The final effort by the brief of the United States to distinguish *Ekelman* is contained in the following argument:

> " • • • The Court of Appeals here did not hold as the government had urged unsuccessfully in *Ekelman*, that mere breach of a fiduciary duty to verify information would suffice for liability if the information was subsequently discovered to be false. To the contrary, the Court of Appeals emphasized that the District Court's 'charge did not indicate that it was a crime not to exercise "proper credit judgment" and did not equate failure to do so with reckless disregard of the truth' (Bernstein Pet. App. C. 44). Instead, the District Court had charged that 'proof of mere negligent falsehood was insufficient' and that, even if the jury found an affirmative duty to verify and to exercise credit judgment, 'the existence of potential recklessness was still a question of fact' (Id. at C. 44-C. 45)." (Brief of the United States, at pp. 22-23).

The Brief of the United States has thoroughly misconstrued the holding of the Court of Appeals and the nature of the issue raised by our petition. The issue is whether

there was any basis in law and in fact upon which the jury could be permitted to find that the specified "affirmative duties" were imposed upon the petitioner.*

Thus, the issue in *Ekelman* is precisely the issue presented by the present case; it involves the same certification as that involved in the present case (*United States* v. *Ekelman*, *supra*, 532 F.2d at 548, fn. 2), and presents a square conflict between the Circuits as regards a substantial and continually recurring problem.

For the above reasons, as well as those set forth in Judge Van Graafieland's dissent, we respectfully urge that the petition for a writ of certiorari should be granted to resolve that issue.

---

* This is made clear by the portion of the Court of Appeals' opinion *not quoted* by the brief of the United States:

> "The charge as we read it was that in determining whether there was reckless disregard of the statements' falsity such as to amount to knowledge, it was for the jury to determine whether as mortgagee ESC had affirmative duties in connection with mortgagor's loan guarantee applications. If such duties were found, the existence of potential recklessness was still a question of fact. The charge as such gave the defendants more than that to which they were entitled (Bernstein Pet. App., at C. 45)."

The opinion of the Court of Appeals went on to hold that:

> "The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of the processing mortgage loans and signing the mortgagee's necessary certification of the application as 'true and complete to the best of its knowledge and belief' did likewise." (Bernstein Pet. App. at C. 45-46).

II.

Petitioner was unconstitutionally denied representation by counsel of her choice.*

The Brief of the United States makes a factually erroneous assertion which lends some color to the government's arguments. Contrary to the Government's assertion, the co-defendant, Harry Bernstein, did not refer the petitioner Behar to Mr. Boitel (Brief of the United States, at p. 24). As noted by the opinion of the Court of Appeals, it was Bernstein's attorney who undertook to and did make the reference. (Bernstein Pet. App., at C. 21). That reference related solely to one Grand Jury appearance in October, 1971, six months elapsed before any other proceeding occurred, and Mrs. Behar then turned to Mr. Boitel for assistance.

The Brief of the United States in opposition argues that: "Since petitioner Behar's waiver was neither free of compulsion nor unequivocal, the trial judge acted within his discretion in refusing to accept it." (Brief of the United States, at p. 26).

It is clear that Mrs. Behar did not have the funds to pay the legal costs which would be incurred by virtue of a trial of many months duration. To that extent, there was a financial pressure upon her to accept payment of her legal costs by her employer. There is no indication that she was compelled to select an attorney chosen by her employer or by her employer's attorney. As it turned out, the attorney that was referred to her was not only acceptable to Mrs. Behar, but her pleadings with the Court

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* This issue is discussed in the majority opinion of the Court of Appeals (Bernstein Pet. App. at C. 21-24), in our petition for a writ of certiorari, at pp. 14-24, and in the Brief of the United States at pp. 23-28.

throughout the conflict of interest hearing demonstrated her overwhelming desire that the attorney in question represent her.

This was so notwithstanding the Court's repeated warnings to her of possible adverse consequences.

The claim that Mrs. Behar's waiver was not "unequivocal" is simply unsupported by the record. (*See* our petition herein, at p. 20).

Finally, the brief of the United States notes that "At sentencing petitioner Behar stated to the Court that she was satisfied with attorney Rosenkranz's handling of her case (D. 46)." (Brief of the United States, at p. 29).

Here was a middle-aged woman who had been through more than two years of proceedings since indictment, and a nine month trial. She was about to be sentenced by the same judge who had divested her of her attorney of choice and who had personally selected her assigned attorney. This was the same judge who had told her, at the time of the conflict of interest hearing, "You could go to jail for more than one hundred years" (C. 274). It is thus, not strange that, with sentence about to be pronounced, Mrs. Behar would respond as follows to the Court's inquiries:

> "The Court: * * * Is there—the gentleman standing to your right is Mr. Rosenkranz your court-appointed lawyer, is that correct?
>
> "Mrs. Behar: Yes.
>
> "The Court: Are you satisfied with the way he handled your matter?
>
> "The Defendant: Yes.

"The Court: Do you want him to appear for you at this sentencing?

"The Defendant: Yes."

This was the one and only time during the entire course of these proceedings that the Court addressed any inquiry to Mrs. Behar concerning her satisfaction with her appointed attorney. Under these circumstances, only a radical, of rather imprudent mind, would have revived the issue concerning counsel of her choice.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitioner Florence Behar

New York, New York
November 15, 1976